EO: 990
BYE: 201602

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-0416

Reversed
Disqualification

PROCEDURAL HISTORY: On February 19, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 125614). Claimant filed a timely request for hearing. On March 23, 2015, ALJ Seideman conducted a hearing and issued Hearing Decision 15-UI-35571, reversing the Department's decision. On April 10, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented certain documents to EAB that it had also offered into evidence at the hearing. The ALJ did not enter the offered documents into the hearing record as exhibits because, although delivery of them to claimant was attempted twice before the hearing, she was not at her home to receive them. In addition, the ALJ concluded that the employer's witness was able to testify adequately to their contents. Hearing Decision 15-UI-35571 at 1; Audio at ~3:15. However, although the employer's witness tried to describe the information in the documents, she was not able to do so under the time constraints of the hearing. Because these documents were relevant to a complete understanding of the circumstances surrounding claimant's discharge, EAB has received them into evidence as necessary to complete the hearing record. *See* OAR 471-041-0090(1) (October 29, 2006). These documents are collectively marked as EAB Exhibit 1. With its written argument, the employer also presented a notarized statement from claimant's supervisor in which the supervisor disputed certain important aspects of claimant's hearing testimony. Because the employer's witness testified at hearing about what the supervisor had told her about the facts in controversy, the supervisor's statement is also necessary to complete the record. It is entered into evidence as EAB Exhibit 2. Any party who objects to our entering EAB Exhibits 1 and 2 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, these exhibits will remain in the record at EAB.

EAB otherwise considered the employer's argument to the extent it was based on information received into the hearing record.

FINDINGS OF FACT: (1) Davis Trans-Lite employed claimant as a truck driver from November 26, 2013 until January 7, 2015. Claimant drove a large tanker truck for the employer.

(2) As a condition of claimant's continued employment, the employer required claimant to maintain a driving record that enabled her to be covered by the employer's liability insurance company when driving the employer's trucks. To maintain her insurability, the employer expected claimant not to receive more than one citation for driving violations during a rolling 12 month period. The employer also expected claimant to refrain from driving for the employer when she was ill, fatigued or under circumstances when her driving ability or alertness was impaired to the extent it might adversely affect her driving performance. The employer further expected claimant to call her supervisor to inform the supervisor if she was reasonably unable to drive a scheduled run due to illness or fatigue and to contact the supervisor or the dispatcher if her driving ability or alertness became impaired after she started a run. Claimant was aware of the employer's expectations since she received a copy of the employer's safety manual on November 25, 2013 and she was familiar with the federal regulations governing the safe operation of commercial trucks. Exhibit 1 at 1, 9, 10-11.

(3) On October 31, 2014, claimant was cited for a driving infraction when she drove her personal vehicle at a speed of 77 miles per hour on a public roadway with a posted speed of 55 miles per hour. Exhibit 1 at 8. Claimant knew her vehicle was exceeding the speed limit when she was stopped for the violation and that her behavior was "foolish." Audio at ~35:38. Claimant pleaded guilty to this traffic violation on November 12, 2014. Audio at ~9:18. Sometime after November 12, 2014, claimant reported to the employer's safety director that she had received this citation and gave the director a copy of it. At that time, the director told claimant that she needed to be careful about her driving because if she received another driving violation in the next year she would be considered uninsurable under the employer's commercial liability insurance policy.

(4) On January 3, 2015, claimant was scheduled to drive the employer's tanker truck beginning at approximately 3:00 a.m. at the employer's truck yard in Toppenish, Washington and travelling approximately 180 miles to Portland, Oregon to make a scheduled delivery at 7:00 a.m. Before claimant started this run, she felt very tired and ill. Claimant did not notify her immediate supervisor or the employer's safety director that she thought her driving ability might be impaired by her physical condition or that she should not operate the truck on the scheduled run. Because of her poor physical condition after she started to drive, claimant decided she would periodically stop and take naps during the drive. Claimant stopped and took a nap while en route to Portland, took another nap when the truck was being unloaded in Portland, and intended to take another nap on the return trip to Toppenish. Although she needed these frequent stops to enable her to continue driving, claimant did not call either her supervisor or the safely director to inform them that her illness was impairing her ability to safely complete the run.

(5) On January 3, 2015 at approximately 2:30 p.m., on the return leg of the trip from Portland to Toppenish, claimant fell asleep while driving on a four lane public highway outside of Mosier, Oregon. Claimant veered into the other lane travelling in the same direction and collided with another vehicle. Exhibit 1 at 3. The damage to the other vehicle was substantial. Police were called to the scene of the accident and issued a citation for careless driving to claimant. Immediately after, claimant called the employer's safety director and told her that she had been too sick to drive the employer's truck that day,

but had thought that she could make the round trip without incident. The safety director told claimant to park the truck immediately and she would send a replacement driver to complete the run and to transport claimant back to Toppenish. At the time of the accident, claimant had been in the truck for approximately eleven and one half hours.

(6) On approximately January 3, 2015 or shortly thereafter, claimant went to a physician for treatment of her illness. The physician diagnosed claimant with pneumonia, "really bad flu" and bronchitis. Audio at ~19:27. The physician immediately confined claimant to "complete bedrest." Audio at ~19:27.

(7) Sometime after the accident on January 3, 2015, the safety director reported the accident to the employer's insurance broker and told the broker that claimant had been issued a citation for careless driving as a result of it. The broker told the safety director that as a result of claimant's speeding violation on October 31, 2014 and her careless driving citation on January 3, 2015, she was not insurable in any commercial insurance market to which the broker had access. Audio at ~8:09, ~10:09, ~11:56; Exhibit 1 at 2.

(8) On January 7, 2015, the employer discharged claimant for engaging in behavior on January 3, 2015 that caused her to become uninsurable as one of the employer's drivers.

CONCLUSIONS AND REASONS. The employer discharged claimant 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.

In Hearing Decision 15-UI-35771, the ALJ concluded that, although claimant's citation for careless driving on January 3, 2015 caused her to become uninsurable under the employer's liability insurance policy, the employer did not discharge her for misconduct arising from her behavior on January 3, 2015. The reasoning underlying this result appears to have been the findings that claimant thought she would be able to safely complete the truck run on January 3, 2015 "with plenty of rest" and she thought she "would have a problem" with the employer if she did not take the run. Hearing Decision 15-UI-35571 at 4. We disagree.

Claimant appeared to contend at hearing that she was not aware that, as condition of her employment as a truck driver, the employer expected her to maintain a driving record that allowed her to remain covered by the employer's liability insurance policy. Claimant based her alleged lack of awareness on the assertion that the employer "never formally notified" or "officially warned" her that two driving infractions in one year would render her uninsurable under the employer's insurance policy, by which she seems to have meant that the employer did not issue a formal written warning to her after she notified it that she had been cited on October 31, 2014 for a speeding violation.. Audio at ~16:02;

~35:59. However, it was not necessary for the employer to establish that it advised claimant of its expectation by way of a written warning if it otherwise placed her on notice that it expected her to remain commercially insurable. Here, the employer's written offer of employment, which claimant signed on November 25, 2013 and kept a copy, plainly and unambiguously stated "[i]f you are deemed 'uninsurable' at any time during your employment with [the employer] you will be immediately terminated" and "all written citations and [w]arnings issued by state/federal agencies for driving violations are also grounds for termination." Exhibit 1 at 1. In addition, claimant's behavior before January 3, 2015 showed that she was aware that driving violations affected her insurability and ability to comply with the employer's standards because, apparently on her own initiative, she turned in the driving citation issued to her for speeding on October 31, 2014 to the employer's safety director soon after she received it. While the employer's safety director also testified that she reminded claimant when she submitted the traffic citation that she needed to be careful and avoid receiving a second on within a year because that would make her uninsurable, claimant stated that she considered that discussion to have been "just casual" and "just one person to another in passing." Audio at ~16:10, ~16:32. Given the undisputed circumstances of this conversation, it is unlikely that the safety director would have made comments about the impact of the traffic citation that reasonably could have caused claimant to minimize their significance. For all of these reasons, the evidence in the record shows that claimant was, most likely, aware that she needed to remain insurable and that receiving a second traffic citation before November 1, 2015 would make cause her to become uninsurable. From this awareness, common sense dictates that claimant was further aware that the employer expected her not to engage in behavior that created an appreciable risk of a second traffic violation and, thereby, placed her continued insurability in jeopardy.

Claimant gave two explanations why she decided to drive the route on January 3, 2015; she asserted that she did not realize how sick she was and thought that she could safely drive if she rested enough en route, and she testified that she drove because her supervisor told her that no one else was available to drive the route after she told him she was "very ill" and "not feeling good at all." Audio at ~16:43, ~16:51, ~17:28. The employer's witness denied that claimant ever called her supervisor before beginning the truck run on January 3, 2015, and the supervisor corroborated the witness's testimony and stated that claimant never called him and never told him she ill, let alone too ill to drive. Audio at ~28:22; Exhibit 2. Claimant's varying explanations at hearing are irreconcilable: either she knew she was too sick to drive as evidenced by her alleged statement to her supervisor and should not have been driving; or she did not call the supervisor at all and tell him how ill she really was. On balance, in light of the employer's prompt response barring claimant from further driving on January 3, 2015 after it learned claimant was ill and the inconsistencies in claimant's statements it is most likely that claimant did not call her supervisor to inform him that she was too sick to drive before starting the run on January 3, 2015.

Claimant conceded that she knew that the employer policies and federal standards prohibited her from operating or continuing to operate a commercial vehicle if she was too ill or fatigued to do so safely or alertly and that if she became ill or fatigued while driving she needed to stop driving, park the truck and call the employer to arrange for a relief driver. Audio at ~25:13, ~26:18, ~26:36; Exhibit 1 at 10; 49 CFR §392.3. The nature and seriousness of the conditions with which claimant was diagnosed after the accident on January 3, 2015, the "complete bedrest" she was prescribed, her acknowledgement that she planned to take frequent rest breaks during the trip due to her illness, and her acknowledgement after the accident that she was too ill to safely drive back to the employer's Toppenish yard suggest the

implausibility of her claim that she subjectively thought that she was well enough to drive alertly and safely before she started the run that day. That she needed to take the planned rest breaks on January 3, 2015 also strongly suggests that her physical condition during the drive was such that she knew she was too sick to operate the truck safely, alertly and in compliance with federal regulations and the employer standards. Under these circumstances, claimant's decision to begin driving when she knew she was very ill or to continue driving it when she needed to take driving breaks to try to accommodate for her illness was itself a wantonly negligent violation of the employer's standards. That she did so, when she reasonably knew it could result in a second traffic violation due to her inability to alertly operate the truck was also a wantonly negligent violation of the employer's standards that she would not engage in driving behavior that jeopardized her insurability under the employer's commercial liability insurance policy. On either theory, claimant's decision to drive the truck on January 3, 2015 was at least a wantonly negligent violation of the employer's standards.

Claimant's wantonly negligent decision to drive on January 3, 2015 may be excused from constituting misconduct if it was an isolated instance of poor judgment under OAR 471-030-0038(3)(c). An "isolated instance of poor judgment" is, among other things, a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior in violation of the employer's standards. OAR 471-030-0038(1)(d)(A). Here, also with wanton negligence, claimant violated the employer's expectation that she refrain from driving behavior that would jeopardize her insurability when she was issued the driving citation for speeding on October 31, 2014. Claimant did not contend that she was unaware that she was speeding when she was given the citation, or that exigent circumstances required her to travel in excess of the posted speed that day. Indeed, claimant acknowledged that her behavior in speeding was "foolish" and appeared to agree that she was aware that she was speeding when she was stopped. Audio at ~35:38. Because claimant's wantonly negligent behavior on January 3, 2015 was preceded by other wantonly negligent behavior in violation of the employer's standards on October 31, 2014, it was repeated and does not meet the requirements for the excuse of an isolated instance of poor judgment.

Claimant's wantonly negligent behavior on January 3, 2015 may also be excused from constituting misconduct if it was a good faith error under OAR 471-030-0038(3)(b). However, claimant did not contend that the reason she drove or continued to drive during the run on January 3, 2015 was caused by any misunderstanding of the employer's requirements or that she subjectively thought that the employer would condone her driving when her physical condition impaired her alertness and ability to safely drive. Because claimant did not make a threshold showing, the excuse of good faith error does not apply in this case.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-35571 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, *pro tempore*, not participating.

DATE of Service: <u>June 8, 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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