

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0796**

*Reversed and Remanded*

**PROCEDURAL HISTORY:** On May 27, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153020). Claimant filed a timely request for hearing. On June 22, 2015, ALJ M. Davis conducted a hearing, and on June 24, 2015 issued Hearing Decision 15-UI-40572, reversing the Department's decision. On July 2, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it sought to introduce new information that it did not have the opportunity to present at the hearing. Because this new information is necessary to complete the record on the issues for which EAB has remanded this case for further inquiry, the written argument and the work attendance record included with it are marked as EAB Exhibit 1 and entered into the record. Any party who objects to the entry of EAB Exhibit 1 into evidence 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 (October 29, 2006). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record.

**CONCLUSIONS AND REASONS:** Hearing Decision 15-UI-40572 is reversed and this matter is remanded for further development of the record.

In Hearing Decision 15-UI-40572, the ALJ found that claimant was discharged only for her absences from work during the period March 3 through March 7, 201, when she was unable to attend work because she in jail, and concluded that claimant was not disqualified from benefits because her mental state during the events that led to her incarceration prevented her from having the willful or wantonly negligent state of mind required for a finding of misconduct. Hearing Decision 15-UI-40572 at 3. However, the employer's witness testified at hearing that the employer also discharged claimant for failing to report for work after she was released from jail, failing to contact the employer to report her absences on those days, and failing to communicate with the employer in any fashion from March 7, 2015 until the employer was able to reach claimant on approximately March 11, 2015. Transcript at 8, 31-32. Therefore, the record needs to be developed about claimant's absences and failures to contact the

employer after March 7<sup>th</sup>. Although the record currently fails to show that claimant was aware she was scheduled to work after March 8<sup>th</sup>, the record should be developed with evidence about when claimant was scheduled to work during the relevant time period, when the schedules were posted so, and whether claimant had the opportunity to review her work schedule(s) for the relevant period before she was incarcerated. The record should also be developed with evidence about whether claimant knew she had missed shifts while incarcerated, and, given that she did not notify the employer of her absences due to incarceration, what claimant thought the employer expected her to do once released from jail after missing several consecutive shifts without notice to the employer, how long she thought she could go without communicating with the employer about her absences and still maintain her employment, why she waited until March 11<sup>th</sup> to make contact, and what caused her to reach out to the employer that day. The record should also be developed with evidence about the employer's attempts to contact claimant, including who called her, how many times, to what phone number or numbers, and whether the employer left messages for her.

With respect to claimant's state of mind during the events that caused the police to arrest her for harassment and criminal mischief in the second degree and led to her incarceration, it appears from Exhibit 1 that claimant pled guilty to the criminal mischief charge on May 27, 2015. Exhibit 1 at 10-11. The Court was not legally permitted to accept claimant's guilty plea unless claimant made the plea, and there was sufficient evidence to establish not only that claimant committed the crime, but that she did it willfully or consciously. *See accord* ORS 135.390, ORS 135.395 (requirements of a guilty plea); ORS 164.085, 164.354 (defining the culpable mental state for commission of criminal mischief in the second degree). In view of claimant's testimony suggesting that the behavior that formed the basis of her conviction was not willful or conscious, the ALJ should ask claimant to explain the discrepancy between her testimony and guilty plea, such as what was claimant's mental state at the time of the criminal conduct, why did she plead guilty to the criminal mischief charge and accept a jail sentence as punishment if she thought she lacked the mental state to support the conviction, and why did she submit to conviction of a crime she is now saying, in essence, that she did not commit. Transcript at 17-19, 22-24; Exhibit 1 at 11. The ALJ should also ask claimant the reason that, if, as she says, her grandmother did not "press charges" and did not "feel threatened" by her, why was not having contact with her grandmother or her home made a condition of her sentence and probation. Exhibit 1 at 11.

With respect to EAB Exhibit 1 and hearing Exhibit 1, the ALJ needs to inquire of claimant and the employer about the accuracy of their substance in light of claimant's testimony at hearing. The ALJ should ask the employer for the information it has to support its contention that, despite claimant's apparent injury to her head or her concussion sustained on February 22, 2015, her attendance, work performance and behavior on the workdays of February 23, 2015 through February 26, 2015 were not affected, and were consistent with those of a person not experiencing a head or brain injury. EAB Exhibit 1 at 1. Such evidence might, at the employer's and ALJ's discretion, include testimony from people who actually observed claimant's behavior and speech in the workplace on these days, and testify about whatever she might have said during these days, if anything, about the incident with her roommate on February 21, 2015 or how she was feeling, and claimant should be given the opportunity to respond.

Finally, claimant's primary argument is that she was not culpable for her incarceration, absences or failures to contact the employer because she had a head injury that affected her mental state. However, the evidence about whether and how claimant sustained a concussion on February 21, 2015, and whether she sustained a second head injury at some time thereafter, was unclear. *See* Transcript at 15, 29;

Exhibit 1 at 16. For example, claimant testified that her head injury occurred when her roommate “tried to kill” her, but also testified that the incident was due to a “huge misunderstanding.” *Compare* Transcript at 23, 28; Exhibit 1 at 1. Claimant said her head was injured, but did not explain the nature or severity of the injury. Claimant also testified that she went to hospital emergency departments on February 22 and on approximately March 1, 2015 for treatment of her concussion and inquiry should be made about the symptoms that caused claimant to seek treatment, the treatment that she was provided and what, if anything, claimant was told about the expected course of symptoms and her recovery.

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 had the mental state required for a willful or wantonly negligent failure to report for work from March 3 through March 11, 2015 or failure to maintain contact with the employer from March 3 through March 11, 2015, Hearing Decision 15-UI-40572 is reversed, and this matter remanded for further development of the record.

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-40572 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.

**DECISION:** Hearing Decision 15-UI-40572 is reversed and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** August 25, 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 Court of Appeals website at [courts.oregon.gov](http://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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