

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0923**

*Hearing Decision 15-UI-41657 - Reversed*  
*Hearing Decision 15-UI-42096 - Reversed*  
*No Disqualifications*

**PROCEDURAL HISTORY:** On June 9, 2015, the Oregon Employment Department (the Department) served notices of two administrative decisions, the first concluding that the employer, Pacific Metallurgical Treatments, Inc. discharged claimant, but not for misconduct (decision # 92716) and the second concluding that the employer, High Temp NW, Inc. discharged claimant, but not for misconduct (decision # 163216. Roger Smith filed timely requests for hearing on behalf of both employers. On July 13, 2015 at 8:15 a.m., ALJ Shoemake conducted a hearing on decision # 92716, and on July 13, 2015 at 9:30 a.m. and July 28, 2015 at 10:45 a.m., she conducted a hearing on decision # 163216. On August 3, 2015, the ALJ issued Hearing Decisions 15-UI-41657 and 15-UI-42096, reversing decision #92716 and decision # 263216, respectively. On August 3, 2015, claimant filed applications for review of Hearing Decisions 15-UI-41657 and 15-UI-42096 with the Employment Appeals Board (EAB). On August 6, 2015, Roger Smith filed an application for review of Hearing Decision 15-UI-41657 on behalf of the employer, Pacific Metallurgical.

EAB considered claimant's written arguments submitted in support of his applications for review. EAB did not consider the declarations submitted on behalf of Pacific Metallurgical, in which it purported to withdraw its objection to claimant's claim for unemployment insurance benefits. A party's position on whether or not a claimant should be disqualified from benefits is not relevant to EAB's determination. EAB is required to make its decisions based on the applicable statutes and regulations and, once an application for review has been filed, EAB will proceed to review the matter unless the application for review is withdrawn. *See* ORS 657.275.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-41657 and 15-UI-42096. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0923 and 15-UI-0924).

**FINDINGS OF FACT:** (1) High Temp NW, Inc. (High Temp) employed claimant as a salesperson beginning on July 28, 2008. As of May 1, 2013, claimant continued to function as a salesperson, with 70 percent of his compensation paid by High Temp and 30 percent paid by a related corporation, Pacific Metallurgical Treatments, Inc. (Pac Met). On March 20, 2015, claimant was discharged by Roger Smith (Smith), purporting to act on behalf of both High Temp and Pac Met.

(2) Both High Temp and Pac Met sold products to steel mills and other heavy industries. Both corporations were mirror images of each other. Smith was one of two board members for High Temp, its president and the owner of 50 percent of its stock. Sam Yockey (Yockey) was the other board member of High Tech, its secretary and treasurer and the owner of the other 50 percent of its stock. Yockey and Smith each owned 50 percent of the stock of Pac Met, and were the only two members of Pac Met's board; Yockey was Pac Met's president and Smith was Pac Met's secretary and treasurer. Claimant was Yockey's son-in-law. Smith and Yockey agreed in 2013 that claimant would split his time as a salesperson between High Temp and Pac Met and each corporation would assume financial responsibility for part of claimant's pay.

(3) Both High Temp and Pac Met expected claimant to refrain from undertaking activities for the purpose of harming either or both companies or diverting sales from them. As a matter of common sense, claimant understood this expectation. However, claimant had not entered into a non-competition agreement with either business. Transcript of 07/13/15 Hearing (Transcript 1) at 33; Transcript of 07/38/15 Hearing (Transcript 2) at 9, 10.

(4) Beginning sometime around approximately 2005, Smith's and Yockey's business relationship began to deteriorate. They seriously disagreed about the management and business directions of High Temp and Pac Met. The rift between the two did not improve and by 2014 they rarely communicated with each other about the two businesses and both businesses were "in turmoil." Audio record of Hearing on July 13, 2014 at 9:30 a.m. (Audio) at ~16:32.<sup>1</sup> Their professional relationship was increasingly dysfunctional and they were trying to sever their jointly held business interests. As a result of Smith and Yockey's fractured relationship, Smith sometimes excluded claimant from business meetings, did not inform claimant of business matters, and did not respond to his phone calls or emails. Audio at ~30:20. Claimant often did not know exactly what was occurring between Smith and Yockey, except that it was "tense." Audio at ~16:32 ~30:20. As of 2015, the disputes between Smith and Yockey ongoing and their joint holding were "in disarray." Audio at ~13:53.

(5) Since approximately 2005, Yockey had a personal and business relationship with Greg Kusinski (Kusinski). Smith did not have the connection to Kusinski that Yockey had. Kusinski had developed and engineered some rods that customers, including Tampa Electric Company (TECO) purchased through High Temp or Pac Met. Kusinski had exclusive contacts with the company in Poland that

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<sup>1</sup> Two hearings were conducted on July 13, 2015. A transcript was prepared for one of the hearings, which is contained in Case No. 2015-UI-35146. The other hearing was not transcribed, however; the audio recording of this hearing is contained in Case No. 2015-UI-35147.

manufactured the rods for the businesses' customers. Smith, Yockey and the businesses did not have those contacts. Generally, when either High Temp or Pac Met received a purchase order for rods from a customer, Kusinski was contacted to determine if the desired rods were available and at what price. Either High Temp or Pac Met financed the payment to the manufacturer in Poland and the shipping costs from Poland. When the customer remitted its payment, 50 percent of the net profit on the sale was distributed to Kusinski and 50 percent was distributed to High Temp or Pac Met. Transcript 1 at 25; Transcript 2 at 16, 17, 26.

(6) Sometime in approximately early 2014, TECO sent a purchase order to High Temp for some of the rods that were obtained through Kusinski's exclusive contacts with the Polish manufacturer. Although this purchase order was sent to High Temp, Pac Met actually fulfilled the order for High Temp through Kusinski and the manufacturer in Poland. The purchase invoice that High Temp sent to TECO indicated that High Temp had fulfilled the order when it had actually been Pac Met. After High Temp received payment from the TECO, Pac Met, rather than High Temp, entered on its books 50 percent of the net profits from the sale to TECO and distributed the other 50 percent to Kusinski. Transcript 2 at 17, 33. Claimant was aware of this transaction and the arrangements between High Temp and Pac Met.

(7) Sometime before June 2014, Yockey told claimant to set up his own company. Transcript 2 at 29. On June 6, 2014, claimant registered CK Metals, LLC (CK) as a limited liability company in which he and his wife were the only members. Transcript at 1 at 22. Yockey had no interest in CK and no role. Audio at ~ 17:19. When claimant established CK, he had no particular business plans for it. Transcript 2 at 29.

(8) Sometime in October 2014, TECO sent a fax to the High Temp office inquiring about purchasing additional rods. Although the fax included a purchase order identifying High Temp as the entity from which the rods were sought, the fax was sent to the attention of Kusinski. Transcript 2 at 28. After he received the fax, claimant contacted Kusinski, who had the contacts to secure the rods from Poland, to determine if they were available and the cost to acquire them. Claimant also contacted Yockey about the purchase order. Audio at ~20:50. At that time, Yockey only acknowledged the receipt of TECO's purchase order. Audio at ~ 21:12. Claimant did not contact Smith to inform him of the order since he had already told Yockey, who had the relationship with Kusinski.

(9) Shortly after the purchase order was received, Yockey told claimant that High Temp did not have the resources to finance an order as large as TECO's. Audio at ~31:46. Later, Yockey told claimant that he and Kusinski had decided to structure TECO's purchase through a corporation in which Kusinski had an interest, that Kusinski was going to finance the cost to acquire the rods and that, rather than split the net profits from the sale to TECO, Kusinski was going to give a commission to High Temp or Pac Met. Audio at ~21:47. Around this time, Yockey told claimant that he was going to use his personal residence address for the documents related to shipping TECO's order. Transcript 2 at 10. Yockey did not tell claimant the reason. *Id.* Yockey did not tell claimant any more of the specifics of the agreement that he and Kusinski had reached. Audio at ~21:53. Yockey often did not disclose to claimant the reasons for his instructions or decisions and his communications to claimant were "sometimes not the best." Transcript 2 at 10. Claimant did not inform the comptroller of High Temp or Smith, High Temp's president, of TECO's purchase order because he assumed that Yockey, who was a corporate officer, a board member and a 50 percent owner, had the authority to restructure the transaction and eliminate High Temp from the role of fulfilling the order. Because Yockey had told claimant that

Kusinski, personally or through a company that he owned, was going to finance the purchase, claimant thought that High Temp needed to be removed as the acquiring entity from TECO's purchase order and from the shipping instructions. On October 9, 2014, claimant sent an email to Yockey advising him that, if the transaction was going to proceed as Yockey had outlined to him, TECO needed to change its purchase order for the rods to reflect that they were going to be supplied by some entity other than High Temp. Claimant offered to call TECO or to personally visit TECO to have it effect the change. Exhibit 1 at 4. Claimant suggested that Yockey execute a notarized statement for him to give to TECO, presumably to show TECO that changing the purchase order was approved by High Temp. Exhibit 1 at 4. Sometime later, Yockey instructed claimant to remove all references to High Temp from the transaction and to substitute IMEC, Kusinski's company, or CK, claimant's company, for it. Transcript at 10. At that time, claimant did not know the reason that Yockey mentioned the use of CK, and assumed that Yockey had communicated his intentions about the transaction to Smith and other representatives of High Temp. Transcript at 2 at 9, 10, 19, 20.

(10) On January 27, 2015 at 1:18 p.m., the shipping company for the rods emailed High Temp's comptroller to ask some questions about the rod shipment. Exhibit 1 at 1. That day at 1:37 p.m., High Temp's comptroller sent an email to claimant asking him why High Temp was involved in the transaction to which the shipper's email referred "when obviously it's Pac Met – and why would Sam [Yockey] use his home address [on the shipping instructions]?" Exhibit 1 at 1. Claimant forwarded that email to Yockey, and did not himself reply to it. Claimant thought that Yockey had "handl[ed] that aspect of [the transaction]," including informing Smith of the steps that he had taken to restructure the TECO purchase. Transcript 2 at 9. Following the comptroller's implicit instructions, claimant then called the shipping company and asked it to remove High Temp's comptroller from all inquiries about the shipment of TECO's order and the shipment's bill of lading. Exhibit 1 at 3. Claimant then emailed Kusinski, asking him the reason that the bill of lading on the shipment had listed High Temp. Exhibit 1 at 2. In response, Kusinski did not answer claimant's question but asked what name should be used. Claimant did not know why Kusinski inquired about this, but replied that "[w]e need to remove High Temp from everything" and the name on the bill of lading should be "either IMEC or CK Metals." Exhibit 1 at 2. On January 28, 2015, Yockey replied to the comptroller's email sent to claimant the previous day. Yockey stated that Kusinski had the contacts necessary to secure the rods, sufficient money to finance the purchase of the rods, and was willing only to pay High Temp a commission on the order that he had secured from the manufacturer, and was not willing to split the profits with it. Yockey further stated that it was "[n]ot a great deal but the best I could do." Exhibit 1 at 1.

(11) Sometime around January 28, 2015, claimant saw an email exchange between Smith and Yockey, in which Yockey explained to Smith that Kusinski was going to handle the TECO purchase as the principal acquiring the rods from the manufacturer and was only willing to give a commission to High Temp or Pac Met for receiving the purchase order. Transcript 2 at 22, 23. Sometime later, the manufacturer tendered the rods that TECO had ordered. Yockey assisted Kusinski in financing the purchase from the manufacturer by transferring funds to a checking account held by CK, claimant's company, and CK transferred those funds to Kusinski's company, IMEC, which held an account at the same bank. Transcript 2 at 17, 33, 35. Yockey told claimant to use CK's bank account as the conduit to transfer the funds to IMEC. Transcript 2 at 17, 20. Until the order was consummated, claimant had not known who would actually fund the payment to the manufacturer. Transcript 2 at 38. Claimant did not know the reason why Yockey and Kusinski were funding the transaction in this manner and neither Yockey nor any else told him about it in advance. Transcript at 20. CK's role in transferring funds from

Yockey to IMEC was its only role in the TECO transaction. Neither claimant nor CK received any commission or compensation from this transaction. Transcript 2 at 20, 33. Ultimately, the rods were delivered to TECO.

(12) Sometime after January 28, 2015, Smith reviewed claimant's files on TECO's order for the rods. On March 20, 2015, Smith, purporting to act on behalf of High Temp and Pac Met, discharged claimant for establishing CK for the purpose of competing with both High Temp and Pac Met, and for his participation in fulfilling TECO's purchase order for the rods, which allegedly diverted a corporate opportunity from High Temp for his personal benefit. Transcript 1 at 5, 17; Exhibit 1 at 28. Yockey disagreed with Smith's decision to discharge claimant.

**CONCLUSIONS AND REASONS:** Smith, acting on behalf of High Temp and Pac Met, 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 Decisions 15-UI-41657 and 15-UI-42096, the ALJ concluded that Smith discharged claimant for willful misconduct. The ALJ reasoned that, even if claimant was following Yockey's instructions in the TECO transaction, he intentionally took steps to ensure that Smith remained ignorant of Yockey's actions in restructuring that transaction. The ALJ further found that claimant knew his actions violated the employers' (i.e, High Temp, Pac Met and Smith's) "reasonable expectation[s] that he perform his job within the best interests of [both corporations], which included both owners and not just [Yockey]." Hearing Decisions 15-UI-41657 at 3; Hearing Decision 15-UI-42096 at 3. We disagree.

In this case, Smith, on behalf of High Temp and Pac Met, contended that claimant colluded with Yockey to divert from both companies (and himself) to Yockey's benefit the profits on the rod sale to TECO. Audio at ~13:15, ~13:53. However, Smith failed to demonstrate that Yockey or claimant received any personal benefit from the TECO sale, or that High Temp or Pac Met did not receive the commission that Yockey referred to in his late January emails to High Temp's comptroller and to Smith. Smith failed to demonstrate that Kusinski did not condition his acquisition of the rods for TECO on High Temp or Pac Met's agreement to receive only a commission on the sale, or that Kusinski was not the impetus for the restructuring of the transaction that resulted in the net profits on the sale not being shared equally between him and High Temp or Pac Met. Assuming Kusinski insisted on this arrangement to acquire the rods, Smith did not demonstrate that in the ordinary course of business Yockey was not authorized to act on behalf of both High Temp or Pac Met to enter into an agreement with Kusinski to restructure the acquisition transaction and to differently allocate the profits from it. Absent any evidence on these issues, Smith failed to show the diversion of a business opportunity from either company or from himself that was undertaken by Yockey or by claimant, on Yockey's behalf.

As well, Smith did not demonstrate that claimant was assisting Yockey in an attempt to divert business from either High Temp or Pac Met. Smith did not dispute the manner in which claimant testified that the rod purchase transaction with TECO earlier in 2014 was structured or that the order was actually fulfilled by Pac Met, with a fraudulent invoice issued to TECO stating that the order had been fulfilled by High Temp when Pac Met was actually financing the acquisition of the rods. The nature of this transaction suggests that Smith, and perhaps Yockey, were willing to hide from TECO what High Temp's and Pac Met's (or Smith's and Yockey's) actual roles were in the acquisition process. The comptroller's January 27, 2015 email to claimant also suggests that she considered Pac Met, and not High Temp to have been the logical corporation to have received the TECO purchase order. In light of this background, it was not a sign of claimant's intent to divert this sale from the corporations by contacting Yockey (the president of Pac Met) and Kusinski (the exclusive source for the rods) about the order upon its receipt. As well, given the obfuscations in the early 2014 purchase by TECO, it was not implausible that claimant would not think that it was not emblematic of deceit when Yockey told him that the acquisition of the rods needed be restructured, particularly if Kusinski insisted or Kusinski otherwise refused to acquire the rods from the manufacturer and High Temp did not have then have the funds to finance the costs of the rods. The evidence that Smith presented was insufficient to rule out these explanations. That Yockey instructed claimant to pass the funds he supplied to finance this order to Kusinski through his business, CK, also was not sufficient to show that claimant was willfully colluding with Yockey to usurp a corporate opportunity from either High Temp or Pac Met, since Smith presented no evidence that there was no logical explanation for this pass-through other than to secure the profits from the transaction to Yockey or to claimant. While it is not obvious why Yockey did this, that fact, alone, is not enough to infer that claimant intended to appropriate High Temp's or Pac Met's share of the net profits on the TECO purchase for Yockey's benefit.,

Finally, Smith did not present any evidence to rebut claimant's testimony that Yockey instructed him to take all of the actions that he did in connection with the restructuring of the TECO purchase transaction, and appeared to concede that Yockey likely did so. Audio at ~13:31. Smith and the ALJ relied on the fact that, as president of High Temp, Smith was claimant's ostensible supervisor when claimant was acting on High Temp's behalf, to support their contentions that claimant's failure to disclose the particulars of the TECO transaction to Smith for approximately three months, from October 2014 until Smith became aware of it in late January 2015, evidenced that he was colluding with Yockey. Hearing Decisions 15-UI-416547 at 3 and 15-UI-42096 at 3. However, as discussed above, TECO's previous purchase order to High Temp was unusually and deceptively structured and, based on that, it was not unreasonable for claimant not to perceive that anything was untoward about Yockey's restructuring of the October 2014 purchase order transaction, if that was Yockey's actual intention. Furthermore, Yockey was one of the two board members of both High Temp and Pac Met, a corporate officer of both, and a 50 percent shareholder. Yockey had the authority to direct claimant's actions on behalf of both corporations at all times regardless of which was involved in a particular transaction, and Smith conceded that he did. Transcript 1 at 23, 34. While Smith might disagree that the steps that claimant took at Yockey's behest furthered High Temp's or Pac Met's corporate interests, he did not demonstrate, as discussed above, that they were not in the interests of either corporation based on Yockey's exercise of his business judgment, or that claimant reasonably should have known at the time that he took them that they were not. That Smith was involved in a dispute with Yockey about the management of the corporations, is also insufficient to show, in and of itself, that the actions claimant took at Yockey's direction were improperly undertaken without Smith's knowledge and approval, particularly when there was no evidence that Smith ever told claimant that Yockey was not authorized to act alone on behalf of

one or both corporations and claimant testified that he thought Yockey was handling the communication with Smith and High Temp about the TECO purchase. Transcript 2 at 9. On this record, Smith, on behalf of High Temp and Pac Met, did not meet his burden to show that claimant unfairly competed with Pac Met and High Temp or that he knowingly participated in diverting a business opportunity from one or both corporations.

Smith discharged claimant from High Temp and Pac Met, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Decisions 15-UI-42657 and 15-UI-42096 are reversed, as set out above.

Susan Rossiter and J. S. Cromwell, participating

**DATE of Service:** September 24, 2015

**NOTE:** 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.

**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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