

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0963**

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On June 24, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 114637). Claimant filed a timely request for hearing. On July 27, 2015, ALJ Monroe conducted a hearing, and on July 29, 2015 issued Hearing Decision 15-UI-42192, affirming the Department's decision. On August 12, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and claimant's written argument. In its argument, the employer disputes the ALJ's finding that claimant made a conscious decision to drive his vehicle after having consumed an amount of alcoholic beverages sufficient not only to cause claimant to be under the influence of alcohol, but to cause an alcohol-induced "blackout" state.<sup>1</sup> Claimant's written argument at 4-6. Claimant asserts that the ALJ therefore erred in concluding that claimant's conduct therefore was a wantonly negligent violation of the employer's expectation he maintain an acceptable driving record, with no convictions or diversions for reckless driving or under the influence of intoxicants (DUII), and cannot be excused as an isolated instance of poor judgment.<sup>2</sup> *Id.*

However, we agree with the ALJ's finding that claimant made a conscious decision to drive his vehicle. As noted in claimant's written argument,<sup>3</sup> claimant testified at hearing only that he did not remember driving his vehicle during his alcohol-induced blackout state. Transcript at 21. That testimony does not

<sup>1</sup> See Hearing Decision 15-UI-42192 at 3.

<sup>2</sup> *Id.* at 3-4.

<sup>3</sup> Claimant's Written Argument at 2.

support claimant's argument that he was not conscious of driving his vehicle at the time. *See* Claimant's Written Argument at 4, 6. Nor does the record contain other evidence supporting claimant's argument that he did not consciously drive his vehicle.

In addition, as found by the ALJ, claimant not only pled guilty to DUII, but to reckless driving.<sup>4</sup> Exhibit 4 at 2. A person commits the offense of reckless driving if the person recklessly drives a vehicle upon a highway in a manner that endangers the safety of persons or property. ORS 811.140(1). "Recklessly," means that a person is aware of and consciously disregards a substantial and unjustifiable risk. ORS 161.085(9). The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. *Id.* Under Oregon law, the court could not have accepted claimant's guilty plea unless the judge ascertained that claimant made it voluntarily and intelligently, after "making such inquiry as may satisfy the court that there is a factual basis for the plea." ORS 135.390(1), ORS 135.395.

The record therefore supports the ALJ's finding that claimant made a conscious decision to drive his vehicle after having consumed an amount of alcoholic beverages sufficient not only to cause claimant to be under the influence of alcohol, but to cause an alcohol-induced "blackout" state. In doing so, claimant acted with indifference to the consequences of his actions, and consciously engaged in conduct he knew or should have known would probably result in a violation of the employer's expectation that he maintain an acceptable driving record. The record therefore supports the ALJ's conclusion that claimant's conduct was wantonly negligent and, because unlawful, cannot be excused as an isolated instance of poor judgment. We therefore agree with the ALJ's ultimate conclusion that claimant's discharge was for misconduct.

On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 15-UI-42192 is affirmed.

Susan Rossiter and J. S. Cromwell

**DATE of Service:** September 18, 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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<sup>4</sup> Hearing Decision 15-UI-42192 at 2.