

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1043

Reversed & Remanded

PROCEDURAL HISTORY: On June 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 155639). The employer filed a timely request for hearing. On June 30, 2015, ALJ M. Davis conducted a hearing, and on August 19, 2015, issued Hearing Decision 15-UI-43211, reversing the Department's decision and concluding that the employer discharged claimant for misconduct. On September 1, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

CONCLUSION AND REASONS: Hearing Decision 15-UI-43211 is reversed and this matter is remanded for further development of the record.

In Hearing Decision 15-UI-43211, the ALJ concluded that the employer discharged claimant because he did not maintain contact with the employer regarding time off from work claimant believed the employer had granted him. The ALJ found that claimant neither contacted the employer nor responded to the employer's contacts to indicate when he would return to work, and concluded that claimant's failure to do so was wantonly negligent and misconduct. The record needs to be developed in regard to claimant's belief that he had approval to take time off from work and his failure to maintain contact with his employer, however.

Claimant testified that sometime after February 20, 2015, he decided that that the employer had approved a request for time off because he found out his work shifts had been cancelled. The ALJ should inquire when and how claimant learned his shifts had been cancelled, how many shifts were cancelled, and who cancelled the shifts. The ALJ should also ask whether claimant he had taken time off in the past, and, if so, what the procedure had been for obtaining approval for this leave.

Claimant testified that between February 20, 2015 and the date of his discharge on April 15, 2015, his only contact with his supervisor occurred during the first part of March 2015. The ALJ should ask claimant and the employer's representative the date of this contact, who initiated the contact, how the contact was made, *i.e.*, by text message, email or telephone, what email address or telephone number claimant used for this contact, and what was communicated in this contact.

At the hearing, claimant's supervisor testified that he began calling claimant in March 2015, to ask when claimant would be returning to work, and sent claimant an email on April 9, 2015, asking that claimant respond to him by April 10. Claimant, however, testified that he never received these telephone calls or the email. The ALJ should inquire what telephone number the supervisor called to attempt to reach claimant, and to what address the April 9 email was sent. The ALJ should ask claimant what email address and telephone number he provided to his employer for communicating about work-related matters, and whether and how frequently he checked his phone and email account for messages during the period at issue.

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's failure to maintain conduct with the employer during his time off from work constituted wanton negligence, Hearing Decision 15-UI-43211 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 15-UI-43211 is set aside, and this matter remanded for further proceedings consistent with this order.

Susan Rossiter and J. S. Cromwell

DATE of Service: September 30, 2015

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 15-UI-43211 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.

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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