

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0097

Reversed & Remanded

PROCEDURAL HISTORY: On October 30, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152147). Claimant filed a timely request for hearing. On November 30, 2015, ALJ Triana conducted a hearing at which claimant failed to appear, and on December 1, 2015 issued Hearing Decision 15-UI-48499, dismissing claimant's request for hearing. On December 17, 2015, claimant filed a request to reopen the hearing. On January 8, 2016, ALJ Triana conducted a hearing at which the employer did not appear and on January 13, 2016 issued Hearing Decision 16-UI-50922, allowing claimant's request to reopen and affirming decision # 152147. On January 28, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Although the employer did not appear at the hearing, it submitted a written argument in which it sought to present evidence to EAB in the first instance. Claimant also submitted an argument in which she attempted to present new evidence that she did not offer during the hearing. In light of our disposition of this matter, the ALJ should consider whether this new evidence is relevant to the issues on which we have remanded this matter and, as appropriate, enter it into the record.

Since no adversely affected party sought review of that portion of Hearing Decision 16-UI-50922 which allowed claimant's request to reopen the hearing, EAB confined its review to claimant's work separation.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-50922 is reversed and this matter is remanded for further development of the record.

Claimant was discharged from work when she became unable to perform work duties for at least five consecutive work days because she was incarcerated from August 10, 2015 through August 22, 2015, and thereafter fled from Oregon with her husband to evade further criminal prosecution. An individual who fails to comply with the employer's work attendance policy due to incarceration has engaged in work-related misconduct if the individual willfully or with wanton negligence created the situation that made his or her compliance with that policy impossible, *i.e.*, the situation which caused the

incarceration. *Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991). In Hearing Decision 16-UI-50922, the ALJ apparently concluded that claimant's conviction on two of the criminal charges that led to her arrest and incarceration, possession of methamphetamine and delivering methamphetamine within 1,000 feet of a school, were sufficient to establish without further inquiry that claimant willfully or wantonly created the situation that led to her incarceration and which made her compliance with the employer's attendance standards impossible. Hearing Decision 16-UI-50992 at 5. Based on this conclusion, the ALJ further concluded that claimant was discharged for work-related misconduct. *Id.*

While conviction of the crime(s) underlying a claimant's incarceration, if an intentional or conscious mental state is an element of the crime, might be sufficient to establish that a claimant willfully or with wanton negligence created the situation that caused her to violate the employer's attendance standards, claimant's testimony and a statement she offered during the hearing from the investigating detective, who was familiar with claimant and her husband and who had witnessed interactions between them, suggested that claimant's husband had undue influence over her and might have been able to exert a form of duress, compulsion or coercion that overcame claimant's volitional behavior, both with respect to her involvement in the crimes for which she was convicted and in her flight from Oregon. Audio at ~39:24, ~40:50; Exhibit 3. On appropriate facts, such an influence over claimant might show that the situation that caused her inability to attend work was not voluntarily created on her part, and was not the result of her willful or wantonly negligent behavior.

On remand the ALJ should inquire into the extent of claimant's involvement in the crimes that led to her incarceration, her state of mind during the involvement, the influence, if any, of her husband on her actions and why claimant might have become involved in criminal activities if she did not want to and would not have otherwise done so. The ALJ should also make similar inquiries surrounding claimant and her husband's flight from Oregon. The ALJ should further follow up on claimant's testimony that she has been diagnosed with PTSD arising from her relationship with her husband, including the source of that diagnosis and relevant information about whether, in light of her PTSD, she was particularly susceptible to influence from her husband and the extent to which his influence might be disproportionate. Audio at ~ 40:50. In this respect, the ALJ should also inquire of claimant if she is able to present any evidence, including her own testimony or evaluations from mental health professionals or other experts, about the combined effects of claimant's PTSD and her husband's instructions on her behavior during the events at issue. Absent an inquiry into claimant's mental state at the time of the events that caused her incarceration and flight, and, consequently, her absences from work, EAB cannot conclude whether claimant willfully or with wanton negligent engaged in the behavior that led her incarceration and flight from Oregon.

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 was discharged for misconduct, Hearing Decision 16-UI-50992 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-50922 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: February 23, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-50922 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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