

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0195**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 83758). Claimant filed a timely request for hearing. On February 4, 2016, ALJ Shoemake conducted a hearing, and on February 9, 2016 issued Hearing Decision 16-UI-52579, affirming the Department's decision. On February 20, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-52579 should be reversed, and this matter remanded for development of the record.

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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee.

The employer discharged claimant for having six accidents in an eight-month period, four of which it determined could have been prevented if claimant had operated his vehicle more carefully or paid better attention. The ALJ concluded claimant's discharge was for misconduct because claimant was aware that he could be discharged for having too many accidents, had a lot of accidents, and, in the final incident, failed to drive "more carefully and at a safe distance," rear-ending the vehicle in front of him

and getting a traffic citation.<sup>1</sup> The ALJ concluded that claimant's conduct could not be excused as an isolated instance of poor judgment because he had other preventable accidents "that resulted from his careless driving," and could not be excused as a good faith error because he "could not have held a sincere belief that the employer would condone another preventable accident."<sup>2</sup> The record does not support the ALJ's conclusions.

To conclude that claimant's failure to drive "more carefully and at a safe distance" that resulted in the final accident was wantonly negligent under the applicable rules, the record must show that claimant was conscious at the time that he was not driving "more carefully and at a safe distance." The wanton negligence inquiry requires that the ALJ ask claimant about his mental state and judgment at the time of the incident. For example, the ALJ must ask claimant if he thought he was driving carefully at the time, at a safe distance, and paying attention to his driving, or if he thought that he was not driving carefully enough or was distracted at the time of the final accident. Likewise, to determine whether claimant's other preventable accidents were "a repeated act or pattern of other willful or wantonly negligent conduct," making the final incident inexcusable as an isolated instance of poor judgment, the ALJ must ask claimant about his mental state and judgment at the time of those incidents, as well.

To determine whether claimant's conduct was excusable as a good faith error, the question is not whether claimant sincerely believed the employer would "condone another preventable accident." The "error" in the good faith error inquiry must focus on claimant's conduct (the manner in which he was driving), and not solely on the result of the conduct (a preventable accident). In this case, the question is whether claimant held a sincere but mistaken belief that he was driving "more carefully and at a safe distance," or was paying close attention to his driving, at the time he caused the rear-end collision. If claimant claims he held such a belief, the ALJ should ask about the sincerity of his belief that he was driving safely, at a safe distance, and paying close attention to determine if his beliefs were objectively reasonable given the circumstances, like the driving conditions at the time, his traffic citation, and other factors.

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 necessary to conclude his actions were misconduct, Hearing Decision 16-UI-52579 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-52579 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>3</sup>

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<sup>1</sup> Hearing Decision 16-UI-52579 at 3.

<sup>2</sup> *Id.*

<sup>3</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-52579 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.

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

**DATE of Service: March 7, 2016**

**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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