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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0257

Affirmed
Disqualification

PROCEDURAL HISTORY: On January 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153131). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Frank conducted a hearing, and on February 26, 2016 issued Hearing Decision 16-UI-53895, affirming the Department's decision. On March 7, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to 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 into evidence at 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. We considered claimant's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Timber Products Co. employed claimant from July 15, 2010 to December 16, 2015 as a press operator.

(2) The employer expected employees to follow its lock-out, tag-out policy and procedures if a piece of equipment was malfunctioning and needed repair. The policy prohibited an employee from placing any part of his or her body into live equipment. Under the policy, before an employee could reach into the space of a piece of equipment, the employee had to turn off and immobilize the equipment and apply his or her personal lock to the equipment to prevent its use or activation until repaired. Claimant received training and a copy of the employer's lock-out, tag-out policy at hire and periodically thereafter. Claimant understood the employer's policy.

(3) In January 2015, the employer gave claimant a warning and suspended her from work because she violated the employer's lock-out, tag-out policy by putting her body inside the metal framework above the press without first turning off the press.

(4) On December 14, 2015, claimant was operating a press with her work partner and a manager. The press stalled and stopped processing veneer. Claimant saw that a piece of veneer was blocking an electronic eye in the machine, preventing the machine from continuing to process the product. Claimant was near the press, but was not inside the area immediately surrounding the press referred to as the "press pit." Claimant made eye contact with the manager, said, "It's that sliver [of veneer], I'm going to grab it," and quickly leaned her body over a rail and the press, reached her arm into a section of the press while it was still turned on, and removed the piece of veneer. Audio Record at 26:20 to 26:29. Claimant did not follow any lock-out, tag-out procedures before she removed the veneer.

(5) After claimant removed the piece of veneer, the manager who saw her remove it told claimant she had violated the employer's lock-out, tag-out policy, and that he had to report it to the employer. Claimant met with the employer's regional human resources manager, and told him that she made a mistake, and that knew she should have locked out the machine before she reached into it. Audio Record at 14:00 to 14:12; 25:34 to 25:41.

(6) On December 16, 2015, the employer discharged claimant for violating its lock-out, tag-out policy.

CONCLUSIONS AND REASONS: We agree with the ALJ and conclude the employer discharged claimant 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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). 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).

The employer discharged claimant because she violated the employer's lock-out, tag-out policy on December 14, 2015 by reaching into a press to repair it without first turning off and locking the press. Claimant knew or should have known through training and the warning she received for the same violation on the same machine in January 2015 that she should lock-out and tag-out a press before repairing it. Claimant testified that she quickly removed the piece of veneer because she was trying to salvage the employer's product, and that the manager who was present at the time of the final incident should have stopped her if she was violating safety policy. Audio Record at 26:04 to 26:44. However, the record does not show the employer had any exceptions to its lock-out, tag-out policy for brief repairs or repairs intended to save product. By repairing the press without turning it off and locking it first, claimant consciously engaged in conduct she knew violated the employer's expectations. Claimant therefore willfully violated those expectations.

Claimant's conduct cannot be excused as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). For conduct to be considered an isolated instance of poor judgment, it must be a single or infrequent act rather than a repeated act or pattern of other willful or wantonly negligent conduct. OAR 471-030-0038(1)(d)(A). Claimant's conduct in the final incident was a repeated act because she had willfully violated the same safety policy in January 2015 by entering the press framework without first

turning off and locking out the machine. Because the final incident was not isolated, it cannot be excused as an isolated instance of poor judgment.

Claimant's conduct did not result from a good faith error. Claimant argued that she believed the manager who was present at the time of the final incident authorized her to remove the board from the live press because he did not tell her to stop when she made eye contact with him and told him she was going to remove the veneer from the live press. Audio Record at 22:13 to 22:33. A good faith error involves a mistake made with the honest belief that one is acting rightly. *Goin v. Employment Dept.*, 203 Or. App. 758, 765-66, 126 P3d 734 (Or, 2006) (citation omitted). The manager did not tell claimant to refrain from reaching into the press. However, claimant did not ask permission to do so, and the record does not show it was reasonable for her to infer that the manager's failure to stop her, when she acted so quickly, meant that he authorized her to disregard the employer's lock-out, tag-out policy. Claimant also argued that she thought she did not have to follow the lock-out, tag-out procedures on December 14 because she was not in the press pit when she reached into the press. Audio Record at 22:14 to 22:33. Claimant did not, however, show she had a reasonable basis to believe the lock-out, tag-out procedures were only required when an employee was in the press pit and she did not present any evidence showing such a belief was plausible. Based on the safety reasons for the procedures, her prior training, the January 2015 warning, and her own acknowledgment to the employer that she had "made a mistake," when she reached into the press, claimant did not show she held a good faith belief or had a reasonable basis to believe that failing to follow the lock-out, tag-out policy was acceptable to the employer when she was not in the press pit. For these reasons, the record fails to show claimant had a sincere belief that the employer authorized her to repair the press without first following the employer's lock-out, tag-out procedures. Thus, the record does not show claimant's conduct during the final incident was a good faith error.

The employer discharged claimant for misconduct. Claimant is disqualified from receiving benefits.

DECISION: Hearing Decision 16-UI-53895 is affirmed.

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

DATE of Service: <u>April 5, 2016</u>

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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