

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0633

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 11, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for misconduct (decision # 91412). The employer filed a timely request for hearing. On May 24, 2016, ALJ Wipperman conducted a hearing, and on May 25, 2016 issued Hearing Decision 16-UI-60348, affirming the Department's decision. On May 31, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument in which it presented new information that it did not offer at the hearing. The employer did not explain why it was not able to present this information during the hearing or otherwise show as required by OAR 471-041-0090 (October 29, 2006) that factors or circumstances beyond its reasonable control prevented him from doing so. For this reason, EAB did not consider the new information that the employer sought to present. EAB considered only information received into evidence during the hearing when reaching this decision.

FINDINGS OF FACT: (1) Circle B LLC employed claimant as a ranch hand from December 1, 2015 until February 25, 2016.

(2) One of claimant's duties was to feed cattle using an automatic feeding machine known as an EZ Ration Processor©. The employer expected that claimant would maintain the EZ Ration© and, after each use, ensure it was in working order for subsequent use. Claimant understood the employer's expectation.

(3) On approximately February 20, 2016, claimant used the EZ Ration© to feed cattle. Claimant noticed that the scale on the EZ Ration© did not appear to be accurately weighing the amounts being fed to the cattle. After claimant completed the feeding, he examined the EZ Ration© and did not notice what might be causing the inaccuracies in the scale or any other problems. February 21, 2016 was claimant's regularly scheduled day off and the ranch manager used the EZ Ration© to feed the cattle. The ranch manager observed that the EZ Ration© was not properly operating and, upon inspection, he noticed that

one bolt was missing from its assembly and two of its bolts were stripped and not functional. On February 22, 2016, the ranch manager spoke to claimant about the condition of the EZ Ration© the day before. Claimant told the manager he had not noticed the missing and damaged bolts and apologized.

(4) On February 25, 2016, the employer discharged claimant for not noticing and replacing the missing defective bolts in the EZ Ration© on February 20, 2016.

CONCLUSIONS AND REASONS: The employer discharged claimant but not 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. 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 carries the burden to show claimant's misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

At hearing, the testimony of the employer's witnesses was clear that the final incident of claimant's alleged misconduct which led to his discharge was his failure to notice the missing and defective bolts in the EZ Ration© on February 20, 2016. Transcript at 10. However, in its written argument, the employer asserted it actually discharged claimant for several alleged instances in which he did not satisfactorily perform his job duties, of which his failure to discover the missing and damaged bolts was one. Employer's Written Argument at 1. In assessing whether the employer discharged claimant for misconduct, EAB customarily considers only the proximate cause of the discharge, which generally the final incident of alleged misconduct giving rise to the discharge. EAB takes this approach when the employer was aware of the incidents of alleged misconduct prior to the final incident and did not discharge claimant for them, presumably because it believed they were not sufficiently serious to merit discharge. Accordingly, claimant's failure to notice and replace the missing and damaged bolts on the EZ Ration© is the proper focus of the inquiry as to whether claimant engaged in misconduct.

While the employer contended the missing and damaged bolts on the EZ Ration© were conspicuous defects that claimant should have noticed, claimant stated he did not notice the condition of those bolts among the "thousands of little things on that machine" when he inspected the EZ Ration© at the end of the day. Transcript at 28. Claimant's failure to observe the condition of the EZ Ration©, including the bolts, without additional evidence, appears to have been an inadvertent occurrence that occurred despite his efforts to determine what was wrong with the EZ Ration©. As such, he did not have the conscious awareness necessary to show the willful or wantonly negligent state of mind to establish misconduct. See OAR 471-030-0038(1)(c). Since the employer did not present evidence showing that claimant had a willful or wantonly negligent mental state when he failed to notice the missing or damaged bolts on the EZ Ration© on February 20, 2016, or from which that mental state might reasonably be inferred, the employer did not meet its burden to show claimant engaged in disqualifying misconduct.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 16-UI-60348 is affirmed.

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

DATE of Service: July 11, 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. 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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