

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0690

Reversed & Remanded

PROCEDURAL HISTORY: On May 5, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 153658). Claimant filed a timely request for hearing. On June 2, 2016, ALJ Jarry conducted a hearing, and on June 3, 2016 issued Hearing Decision 16-UI-60994, affirming the Department's decision. On June 10, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument accompanied by several documents not offered into evidence during the hearing. The relevance of some of these documents was not readily apparent. Given EAB's disposition of this matter, claimant may seek to present these documents during the hearing on remand and the ALJ may determine in the first instance whether they are relevant, were properly served on the other parties in advance of the remand hearing and should be admitted into evidence.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-60994 is reversed and this matter is remanded for further development of the record.

In Hearing Decision 16-UI-60994, the ALJ concluded that the employer discharged claimant on March 18, 2016 for her final absence from work on March 14, 2016. It was not disputed that claimant was in jail from Friday, March 11, 2016 until Monday morning, March 14, 2016, and was not able to report for work during the time she was incarcerated. Relying on *Weyerhaeuser Company v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991), the ALJ concluded that claimant's failure to report for work or to notify the employer of her absence on March 14, 2016 was a wantonly negligent violation of the employer's standards since she "did not demonstrate that driving her vehicle under the influence of alcohol [the crime for which she was arrested and incarcerated from March 11, 2016 through March 14, 2016] was her only option." Hearing Decision 16-UI-60994 at 3. In this respect, the ALJ erred and impermissibly shifted the burden of persuasion from the employer to claimant in reaching her decision. See *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (the employer has the burden of proof in a discharge case).

The ALJ did not sufficiently develop the evidence about the behavior of claimant and claimant's husband preceding claimant's arrest for DUI on March 11, 2016 to allow a determination of whether claimant's arrest and her subsequent incarceration were caused by her wantonly negligent behavior. According to claimant, she consumed alcohol after she went home on March 11, 2016, went to sleep, was awakened to her husband "smacking [her] on the back," "didn't even put socks on" and she "jumped and went into fight or flight," and "jumped in [her] car and – because [she] didn't have a phone" and "unfortunately [she] got a DUI." Transcript at 20. The ALJ should have inquired about how much alcohol claimant consumed before she was awakened by her husband, why she consumed the alcohol, what time she went to bed, and how long she had been asleep before her husband awakened her. The ALJ should also have developed the evidence as to whether the husband's behavior that evening was physical abuse such that claimant thought she needed to escape regardless of the alcohol she had consumed and its effects on her. Specifically, the ALJ should have inquired into what exactly claimant meant when she testified her husband "smacked" her, whether there was a history of physical altercations between claimant and her husband, whether claimant thought her husband's behavior would escalate if she did not leave the home and why, and anything else the husband said or did that led claimant to flee the home or believe she needed to flee the home, including, if relevant, the nature of the husband's conduct and body language. The ALJ should further have asked claimant to describe her "fight or flight" response, what alternate actions she considered taking other than leaving the home, why she chose to leave by car instead of walking, and why she decided leaving the home was preferable to those alternatives. The ALJ should also have asked what, if anything, claimant did between being awakened by her husband and leaving the home, such as dressing, putting on her shoes, getting her keys or her purse, or anything else she did, how much time elapsed before she left the home, and should have asked claimant to describe the behavior of her husband during this time. As well, the ALJ should have asked claimant the relevance of her not having her cell phone, how her behavior would have been different if she had her cell phone and where she intended to travel in her car when she left her home. Finally, the ALJ should have also inquired into whether claimant felt intoxicated or impaired when she got into her car or while driving and, if she did, why she continued to drive, how long she drove before she was pulled over, why she was pulled over, and her blood alcohol content when she was pulled over.

With respect to claimant's behavior on March 14, 2016, claimant testified she was released from jail at around 9:30 or 10:30 a.m., called the employer's human resources supervisor immediately upon arriving home, told the supervisor that she "had to take care of certain things" and that her husband "smacked [her] in [her] face" her during this phone conversation. Transcript at 20. The ALJ should have more fully developed the record about why claimant did not report for work on March 14, 2016 after she was released from jail, including the reason(s) she did not, whether the behavior of her husband was a factor in her decision and, if so, why it was and whether claimant was injured by the husband's "smack." The ALJ should also have inquired about the specific details of the conversation between claimant and the supervisor on March 14, 2016, whether claimant told the supervisor she was not going to report for work that day and the supervisor's response, what claimant did on March 14, 2016 after not reporting for work, and whether claimant called any employer representatives after March 14, 2016, for what purpose, and what was the substance of any such conversations.

The record is not clear about when after claimant's absence of March 14, 2016 the employer decided to discharge her. Claimant's testimony was that she was informed on March 18, 2016 that she was discharged and the employer's human resources supervisor appeared to settle on March 18, 2016 as the date of claimant's discharge. Transcript at 23, 27, 31. The ALJ should have inquired of the employer

why it waited until March 18, 2016 to discharge claimant if the final incident was claimant's absence on March 14, 2016. The ALJ should also have followed up on the testimony of the human resources supervisor that when she saw claimant in the hospital emergency room on March 18, 2016, "at the time she [claimant] could have saved her job possibly with the owners," including whether the witness meant that the decision to discharge claimant had not yet been made, and if so, when it was made and for what reason it was made, what claimant might have done to keep her job, and whether claimant knew what she needed to do to keep her job. Transcript at 26. The ALJ should also have followed up the owner's testimony that, after claimant's absence of March 14, 2016, she "could have walked in this office the next day and talked to me. My door is always open – and came in and talked to me and probably saved her job but it didn't mean enough to her to do that." Transcript at 29. The ALJ should have inquired into what date was the "next day," what claimant could have done that would have saved her job, whether the owner was willing to continue claimant's employment after her absence on March 14, 2016 and, if so, why exactly and when the employer decided to discharge claimant and whether and how claimant was reasonably on notice that, if she took certain steps the employer would not discharge her. The ALJ should also allow each party the opportunity to respond to the other's evidence.

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 the employer discharged claimant for misconduct, Hearing Decision 16-UI-60994 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-60994 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: August 2, 2016

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-60994 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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