

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1024

Affirmed
No Disqualification

PROCEDURAL HISTORY: On July 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 141222). Claimant filed a timely request for hearing. On August 30, 2016, ALJ S. Hall conducted a hearing, at which the employer failed to appear, and issued Hearing Decision 16-UI-66585, concluding the employer discharged claimant, but not for misconduct. On September 6, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer argued that it did not receive notice of the hearing, and so was unable to offer evidence into the hearing record. The employer's complaint is construed as a request for EAB to consider new information under OAR 471-041-0090 (October 29, 2006). OAR 471-041-0090(2)(b) allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer offered no circumstantial evidence to support its assertion that the notice of hearing, though mailed to the employer at its address of record in Glendale, Oregon, was not delivered. Documents sent through the U.S. Postal service are presumed to have been received by the addressee, subject to evidence to the contrary. OAR 137-003-0520(9). The employer's bare assertion of non-receipt is insufficient to overcome the presumption of receipt. Its request to have EAB to consider new information under OAR 471-041-0090 is, therefore, denied.

FINDINGS OF FACT: (1) A & M Transport, Inc. employed claimant as a truck driver from July 21, 2011 to June 28, 2016.

(2) The employer expected claimant to drive with due caution and avoid traffic collisions while operating the employer's vehicles. In the event a collision occurred, the employer expected claimant to check other drivers for injuries, take pictures of the accident scene and cooperate with police. Claimant understood those expectations.

(3) On June 21, 2016, claimant operated the employer's truck in heavy, slow-moving traffic. He looked to his right out of concern about what a driver in a vehicle alongside him was doing when the traffic in

front of him suddenly stopped. Claimant was unable to stop his truck in time and collided with the car immediately in front of him, pushing it into another car. After the collision, claimant checked the other drivers for injuries, took pictures of the accident scene and cooperated with police. Police did not issue claimant a citation because of his conduct. On June 28, 2016, the employer discharged claimant because of the June 21, 2016 traffic accident.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. 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. The employer has the burden to prove misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Claimant had a traffic accident while driving the employer's truck, which likely violated the employer's expectation that he not have accidents. However, on this record it appears that claimant was exercising due caution while operating the truck given existing traffic conditions and was unable to avoid the collision. It also appears that after the accident he complied with the employer's expectations that he check on the welfare of other drivers, take pictures to document the accident scene and cooperate with police. Notably, police did not cite claimant for recklessness or a law violation in connection with the collision. Given the circumstances as developed on this record, claimant did not engage in willful or wantonly negligent misconduct with respect to the June 21, 2016 traffic accident. Accordingly, his discharge was not for misconduct and he is not disqualified from receiving benefits because of the work separation.

DECISION: Hearing Decision 16-UI-66585 is affirmed.

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

DATE of Service: October 3, 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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