

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-1105**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On August 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 154143). Claimant filed a timely request for hearing. On September 7, 2016, ALJ M. Davis conducted a hearing, and on September 8, 2016 issued Hearing Decision 16-UI-67078, concluding the employer discharged claimant, but not for misconduct. On September 23, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-67078 should be reversed, and this matter remanded.

In Hearing Decision 16-UI-67078, the ALJ found as fact that claimant had to take an annual physical as a condition of maintaining the commercial driver's license required to hold his job, did not pass his July 2015 physical because he had a cataract, and, consequently, lost his job, despite his willingness to continue working.<sup>1</sup> The ALJ reasoned that claimant's work separation was a discharge because the employer did not have continuing work available to claimant without a CDL.<sup>2</sup> Regardless of whether claimant quit or was discharged, however, he must be disqualified from receiving unemployment insurance benefits if the work separation was due to a willful or wantonly negligent failure to maintain a license necessary to the performance of his occupation that is reasonably attributable to him. OAR 471-030-0038(3)(c) (discharge); OAR 471-030-0038(5)(b)(E) (voluntary leaving).

The ALJ reasoned that claimant's discharge was not for misconduct because "[n]o evidence was presented to establish that claimant's failure to pass the physical exam was reasonably attributable to him."<sup>3</sup> Although we agree with the ALJ that claimant's development of a cataract was not attributable to his own willful or wantonly negligent conduct, claimant's failure to take reasonable steps to obtain medical treatment for his cataract when he knew that such failure would result in a loss of license might be. Claimant knew at least two months prior to his physical that he had a cataract, knew he would not

<sup>1</sup> Hearing Decision 16-UI-67078 at 1.

<sup>2</sup> Hearing Decision 16-UI-67078 at 2.

<sup>3</sup> Hearing Decision 16-UI-67078 at 3.

be able to pass a physical, and knew that the consequence of not passing his physical would be the loss of his job. Given claimant's knowledge of his health and the consequences, the record must be developed as to what steps he took, if any, to obtain medical treatment for his condition in the months before his annual physical, *i.e.* what steps, if any, claimant took to avoid losing his CDL and losing his job.

On remand, the ALJ should ask claimant when he learned he had a cataract, what treatment he sought, why he did not schedule cataract surgery prior to his physical exam, and what, if any, steps claimant took to maintain his CDL and remain employed. If claimant testifies that he did not take any steps to treat his cataract before losing his license, the ALJ should ask claimant why he was prevented from doing so or chose not to do so, when he knew leaving his cataract untreated would cause him to lose his job. The ALJ should ask the employer whether claimant informed management at any point that he had a cataract or thought he would not pass his 2015 annual physical exam, what the employer told claimant, what options the employer had for claimant that might have enabled him to remain employed despite his cataract, and whether the employer would have allowed claimant to take time off work or a leave of absence to have cataract surgery. The ALJ should also allow the parties to respond to the other's testimony and ask any follow up questions the ALJ deems necessary to develop a full record.

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's work separation was disqualifying, Hearing Decision 16-UI-67078 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-67078 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>4</sup>

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

**DATE of Service:** September 30, 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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<sup>4</sup> NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-67078 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.

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