EO: 200
BYE: 201737

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1341

Reversed & Remanded

PROCEDURAL HISTORY: On October 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 92413). Claimant filed a timely request for hearing. On November 22, 2016, ALJ Vincent conducted a hearing, and on November 28, 2016 issued Hearing Decision 16-UI-71794, affirming the Department's decision. On November 30, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Craig Brothers Complete Auto Services, Inc. employed claimant as an auto mechanic from June 1, 2016 until September 23, 2016.

(2) Before September 22, 2016, claimant had on a few occasions caused damage to some vehicles that he was repairing for the employer's customers. On September 22, 2016, claimant placed a pick-up truck on the vehicle rack in the bay to enable him to make repairs. Claimant left the truck's transmission in neutral while it was up on the rack and the truck rolled off the rack, hit another rack and was damaged. Claimant's manager was aware of this incident when it first happened and called the employer's owner to determine what should be done as a result of the damage. The employer's manager then approached claimant in the vehicle bay and told claimant to go home and they would discuss the incident the next day. At that time, it was shortly after 4:30 p.m. and the regularly scheduled end of claimant's shift was 5:00 p.m.

(3) On September 22, 2016, as claimant was putting his tools away and preparing to leave for home as his manager had instructed him, the owner arrived at the workplace and went up to claimant in the vehicle bay. The owner was upset and began yelling at claimant about the incident in which the truck had rolled off the vehicle rack. Audio at ~ 24:14. When claimant tried to explain what had happened, the owner became more upset because he thought claimant was "throwing excuses [at him]." Audio at ~23:44. The owner and claimant started "yelling back and forth at each other." Audio at ~24:14. Near the end of their interaction, claimant told the owner, "I'm done talking to you," intending to stop the owner from continuing to yell at him. Audio at ~8:43. The owner then stated to claimant, "You quit your job." Audio at ~7:30. Claimant told the owner that he had not quit his job. Audio at ~7:33. Claimant then went to the manager's office and spoke to him. Claimant asked the manager if he was

"fired" and the manager told him he was not. Audio at ~7:48. Claimant told the manager he was not quitting his job, and they both agreed claimant would come back the next day and they would discuss the damage to the truck and claimant's role in it. Audio at ~7:50. Claimant locked up his tools and went home.

(4) On September 23, 2016, claimant reported for work at 7:30 a.m. When claimant arrived at work, the manager told him the employer had decided his services were no longer needed and to turn in his work uniform and to remove his tools and personal belongings from the workplace. The employer discharged claimant on September 23, 2016.

CONCLUSIONS AND REASONS: The employer discharged claimant on September 23, 2016. Hearing Decision 16-UI-71794 is reversed and this matter is remanded from further development of the record to determine whether claimant's discharge was or was not for misconduct.

In Hearing Decision 16-UI-71794 the ALJ concluded that claimant voluntarily left work on September 22, 2016 when he left the workplace on that day. The ALJ found as fact that claimant told the owner on September 22, 2016 that he "had enough" and reasoned that since claimant "abandoned" the workplace in the "middle of his shift" on September 22, 2016 and because claimant's statement "expressed an intent to cease working for the employer at that moment and in the future," claimant was unwilling to continue to work for the employer and his work separation was a voluntary leaving. Hearing Decision 16-UI-71794 at 2. We disagree.

OAR 471-030-0038(2) (August 3, 2011) sets out the standard for determining whether a work separation should be characterized as a voluntary leaving or a discharge. If claimant could have continued to work for the employer for an additional period of time when the work separation occurred, the separation was a voluntary leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue to work for the employer for an additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

At the outset, while the ALJ considered it significant that claimant left the workplace in the "middle of his shift," both parties appeared to agree that claimant in fact left at 4:30 p.m., which was thirty minutes before the regular end of his shift. Audio at ~13:06. Claimant also testified and the employer's witness, the owner, did not dispute that claimant's manager told him to go home after the accident on September 22, 2016 and they would discuss the accident on September 23, 2016, which is what claimant was doing when he left the workplace on September 22, 2016. Audio at ~6:29, ~7:48. Nor did the owner contest that claimant told him in response to his assertion that claimant was quitting on September 22, 2016 that he was not quitting and that claimant confirmed this position in a statement he made to the manager immediately before he left the workplace on September 22, 2016. Further, the owner was unable to identify any actions or statements of claimant on September 22, 2016 other than that he left early to support that claimant intended to quit when he left work early, rather than trying to discontinue the argument with the owner. Audio at ~27:30. Taken against this backdrop, that claimant left the workplace when he did and under the circumstances that he did was not necessarily indicative of an intention to quit work. While claimant denied doing so, if claimant did state to the owner he "had enough" before he left on September 22, 2016, that comment was, under the circumstances, an ambiguous statement of claimant's intentions about his continued employment since it could just as readily have referred to his having had enough of the argument with the owner as having referred to

having had enough of his employment with the employer. Audio at ~16:40. Finally, that claimant reported for work on September 23, 2016 was additional evidence that he had not intended to quit work the day before, and the owner did not rebut that the manager needed to tell claimant on September 23, 2016 that the employer was not willing to allow him to continue working. Viewing the evidence as a whole, the preponderance of it shows that claimant's work separation was a discharge on September 23, 2016, when the manager told claimant he no longer worked for the employer. The ALJ erred in concluding that claimant voluntarily left work.

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) 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 by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

It appears from the record that the employer discharged claimant on September 23, 2016 as a result of the perception that claimant was responsible for the pick-up rolling off the vehicle rack on September 22, 2016. However, the ALJ did not develop the evidence sufficiently to permit determination of whether claimant's willful or wantonly negligent behavior caused the truck to roll off the rack. The employer's owner stated claimant was an experienced mechanic and should have known not to put a vehicle on the rack in neutral, which allowed the vehicle to roll from the rack. Audio at ~20:19. The ALJ should have asked both parties for a description of the cause or the reason(s) that the pick-up rolled from the rack, the employer's protocols or expectation(s) that claimant might have violated that led to this incident, how claimant was aware of the protocols or expectation(s) and what action or actions claimant might have taken that would have avoided damaging the pick-up on September 22, 2016. Claimant testified that he was "rushing" to complete his work on the pick-up, which could have set into motion the circumstances that caused the truck to roll off the rack. Audio at ~6:13, ~34:16. The ALJ should have, but did not investigate why claimant was rushing, if it was imperative that claimant rush and why, if claimant was cutting corners in his hurry and how he was doing so, what claimant was thinking when he put the pick-up on the rack in neutral and whether he was aware he had left the truck in neutral. The owner mentioned at hearing that there were some incidents before September 22, 2016 in which claimant damaged customers' vehicles or other property. Audio at ~21:48, ~23:00. The ALJ should have asked the parties about those incidents, both to determine whether those incidents made it more or less foreseeable that the pickup would be damaged on September 22, 2016 if he "rushed," and, if the record ultimately shows that claimant's behavior on September 22, 2016 was wantonly negligent, to determine whether or not the incident was isolated or was a repeated act or pattern of other willful or wantonly negligent conduct.

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 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-71794 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-71794 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 6, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-71894 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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