

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0034

Reversed & Remanded

PROCEDURAL HISTORY: On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 70528). Claimant filed a timely request for hearing. On January 3, 2017, ALJ Allen conducted a hearing, and on January 6, 2017 issued Hearing Decision 17-UI-74261, affirming the Department's decision. On January 10, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered claimant's written argument when reaching this decision.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-74261 must be set aside as unsupported by a complete record, and this matter remanded.

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 ALJ concluded that claimant's discharge was for misconduct, finding that claimant's failures to report to work or notify the employer of his absences on October 13th and October 14th were "at least a wantonly negligent violation of the employer's policy" without explaining how that was the case given that claimant missed work because he was incarcerated and unable to leave the jail, and his incarceration caused him to be entirely unable to place a phone call to the employer at that time. Hearing Decision 17-UI-74261 at 3. We disagree that the record supports the ALJ's decision.

Where, as here, the employer discharged claimant because his incarceration left him unable to report to work for scheduled shifts or notify the employer that he was going to be absent from work, the relevant inquiry is whether claimant willfully or, with indifference to the consequences of his actions, consciously engaged in conduct he knew or should have known would probably result in his

incarceration and resultant inability to report to work or notify the employer of his absence. *See accord Weyerhaeuser Co. v. Employment Division*, 107 Or App 505, 812 P2d 44 (1991).

Although claimant initially indicated that he was arrested and incarcerated because he “stole” tools from a neighbor, suggesting that he intentionally committed the crime of theft, claimant subsequently referred to the charge against him as “an alleged theft charge;” he also testified that he had not meant to steal, did not know what happened, and “just snapped.” *Compare* Transcript at 38; Transcript at 43, 45. Given the full scope of claimant’s testimony about the conduct that ultimately resulted in his discharge, the ALJ must inquire further into the conduct that caused claimant’s arrest and incarceration before the record is sufficient to determine if he willfully or with wanton negligence created the circumstances under which it was impossible for him to report to work or notify the employer of his absences.

On remand, the ALJ should ask claimant, to the extent claimant is willing to testify about the incident, what he did that led to his arrest, why he engaged in that conduct, what his mental state was at the time, whether he thought his conduct might cause him to be arrested and/or incarcerated, whether he has been convicted of a crime in connection to the conduct that led to his arrest, and whether any such conviction was the result of a guilty or no contest plea. The ALJ should ask claimant whether he was capable of controlling his conduct at the time of the incident that led to his arrest, and whether he has any mental health issues or conditions that might have been a factor in his decision to engage in the conduct that led to his arrest. The ALJ should also follow up on any matters he deems necessary to the relevant inquiry, allow cross-examination, examine the employer’s witness(es) if he deems it necessary to the development of the record on remand, and allow the parties to respond to any evidence the other parties provide.

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 discharge was for misconduct, Hearing Decision 17-UI-74261 is reversed, and this matter is remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-74261 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.

DECISION: Hearing Decision 17-UI-74261 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 31, 2017

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.