

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0069

Reversed & Remanded

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 142829). Claimant filed a timely request for hearing. On January 5, 2017, ALJ L. Lee conducted a hearing, and on January 13, 2017 issued Hearing Decision 17-UI-74665, concluding claimant voluntarily left work without good cause. On January 19, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-74665 should be set aside, and this matter remanded.

The nature of the work separation. The ALJ concluded that claimant voluntarily quit work because, although he “had not been formally notified of his pending termination . . . there was sufficient evidence to show that he quit his job one day before he was to be discharged” and, for that reason, his “work separation is properly characterized as a voluntary quit.” Hearing Decision 17-UI-74665 at 3. Under OAR 471-030-0038(2)(a) (August 3, 2011), however, a voluntary leaving can only have occurred if claimant “could have continued to work for the same employer for an additional period of time.” If “the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer,” the work separation was a discharge. OAR 471-030-0038(2)(b).

In this case, claimant notified the employer at the end of his shift on July 28th that he would not return to work, and testified that the only reason he did so was that he knew the employer was going to discharge him. Transcript at 20-21. The employer’s witness testified that there were imminent plans to discharge claimant, and the discharge was “supposed to take effect on July 29th.” Transcript at 6. Therefore, in order to determine whether the work separation was a quit or a discharge the ALJ must on remand ask the employer whether or not the employer was going to allow claimant to work on July 29th. If no continuing work was available, the work separation would be a discharge, not a voluntary leaving.

The applicable rule(s). The ALJ concluded that claimant was disqualified from receiving benefits because of his work separation, based in part on OAR 471-030-0038(5)(b)(E), which states that leaving

work without good cause includes the “[w]illful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved, so long as such failure is reasonably attributable to the individual.” OAR 471-030-0038(5)(b)(E).¹ The ALJ found that “[e]ngineering associates are required to be on location . . . so claimant was required have [*sic*] valid driving privileges,” and concluded claimant’s “occupation” required he maintain a valid driver’s license. Hearing Decision 17-UI-74665 at 1. We disagree.

At most, the record shows that the employer required claimant to hold a valid driver’s license as a condition of his *job*, but fails to demonstrate that maintaining a driver’s license was necessary to the performance of his *occupation*. The employer extended the requirement to “all” employees, including people in claimant’s “classification” who drove as part of their specific jobs, but testified that not all employees in that classification were required to drive and that the employer considered transferring claimant as an alternative to ending his employment. Transcript at 8, 11, 14, 15, 16. In essence, while the employer required a driver’s license as part of claimant’s job, the record fails to show that any such license was generally required of those in the engineering occupation.² Accordingly, neither OAR 471-030-0038(5)(b)(E) nor OAR 471-030-0038(3)(c) apply to claimant’s work separation.³

The work separation. Regardless whether claimant quit work to avoid a discharge, or was discharged, whether or not he is disqualified from receiving benefits depends on whether his conduct with respect to the DUII and license suspension was for misconduct. The ALJ reasoned that claimant was disqualified from receiving benefits because, as an alcoholic, “he knew or should have known he should not have even one drink in order to avoid activating his dependence on alcohol,” “[n]onetheless” he “decided to drink, and his decision to drink, which he made while sober, was wantonly negligent, perhaps even willful, given that he knew alcohol could impair his judgment and impaired judgment could prompt him to drive,” making his license suspension “misconduct.” Hearing Decision 17-UI-74665 at 5. The ALJ reasoned that because claimant quit to avoid being discharged for misconduct, he quit work without good cause. We disagree.

As a preliminary matter, while claimant described himself as an alcoholic, the ALJ did not cite to any source for her conclusion that claimant “activated” his alcoholism or that alcoholism can be “activated,” and there is insufficient evidence about the circumstances under which claimant consumed alcohol to suggest that claimant “chose” to consume it, much less that he “activat[ed] his dependence on alcohol by choosing to consume it. Alcoholism is generally defined to include “a pattern of alcohol use that involves problems controlling your drinking, being preoccupied with alcohol, continuing to use alcohol

¹ The corollary rule that applies to discharges states that “[t]he willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct, so long as such failure is reasonably attributable to the individual.” OAR 471-030-0038(3)(c).

² See National Society of Professional Engineers website, description of the requirements necessary to be a professional engineer (<https://www.nspe.org/resources/licensure/what-pe>). We take notice of this generally cognizable fact. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

³ The applicable law is ORS 657.176(2), and the applicable rules are OAR 471-030-0038(4) and (5), establishing what is and is not “good cause” for leaving work, and OAR 471-030-0038(1) and (3), establishing the meaning of “misconduct.”

even when it causes problems...”⁴ A symptom of alcohol dependency is being unable to limit one’s alcohol intake, even if one wants to do so, and even if consuming alcohol causes significant problems in one’s life.⁵ Not to suggest that claimant was not responsible for his actions and the foreseeable ramifications thereof, but the ALJ’s suggestion that claimant “activated” his alcoholism by, or that alcoholism can indeed be “activated,” is unsupported by the record, and she must conduct an inquiry to support the proposition before making such a finding.

Claimant began to testify during the hearing about his activities at and just before the time he was arrested and charged with Driving Under the Influence of Intoxicants (DUII). The ALJ interrupted, stating, “Just so you’ll understand, though, at this point in time it’s sort of a done deal with regards to the crime of DUII because you pled guilty . . . essentially what that does it [*sic*] you are confirming the establishment of each element of the crime. And for the crime of DUII the first element is driving, driving while under the influence of intoxicants. So essentially what I’m trying to tell you is you would be foreclosed from arguing that you had not committed the crime at this point in time.” Transcript at 22. Although we agree with the ALJ that claimant’s guilty plea and conviction preclude her from finding claimant was not convicted of and did not plead guilty to DUII, and all of its elements, the ALJ erred in preventing claimant from discussing the events that led to his arrest and conviction.

ORS 813.010(1) states that a person commits DUII if he drives while he has a .08 blood alcohol content or is “under the influence” of one or a combination of intoxicating or controlled substances or inhalants. That law, as written, does not require proof or admission that the person had a culpable mental state at the time he engaged in the prohibited conduct. Under Employment Department law, however, claimant may only be disqualified from benefits for the commission of misconduct connected with the work if he engaged in the prohibited conduct willfully or with wanton negligence, or if he quit work to avoid the consequences of his commission of misconduct. ORS 657.176(2); OAR 471-030-0038. Therefore, the ALJ was not prohibited by reason of claimant’s conviction or guilty plea from developing the record with respect to claimant’s version of the events at issue as those events related to claimant’s mental state. In the absence of a fully developed record, however, at this point the record establishes only that claimant consumed alcohol.

On remand, the ALJ should ask claimant to describe the incident that resulted in his arrest, beginning prior to driving to the park, and describing what he was doing – and thinking – at each relevant step. The ALJ should ask claimant what alcohol or other intoxicating substances or inhalants he consumed prior to driving to the park, how he behaved, what happened when he arrived that led others to complain about him, why he engaged in that behavior, if he was intoxicated or had consumed alcohol at the time of that behavior, what alcohol he consumed, in what quantity, how long after arriving at the park he began consuming alcohol, whether he brought alcohol with him, if he had planned to consume alcohol after arriving, why he consumed alcohol, what effects he felt after consuming alcohol, whether he went near or inside his vehicle after consuming alcohol and, if so, what he did there, whether he drove after consuming alcohol, whether he made a decision to drive, and where he drove. The ALJ should ask

⁴ We take notice of this generally cognizable fact. <http://www.mayoclinic.org/diseases-conditions/alcohol-use-disorder/basics/definition/con-20020866>. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

⁵ *Id.* <http://www.mayoclinic.org/diseases-conditions/alcohol-use-disorder/basics/symptoms/con-20020866>

claimant if he thought at any point that he was intoxicated, thought at any point he was too intoxicated to drive, if he believes he sat in the driver's seat of or operated a vehicle while intoxicated, whether he recalls the events of that day, and what happened during and after his interaction with police. Since his refusal to submit to blood alcohol testing contributed to his license suspension, the ALJ should ask claimant why he chose not to take the test, whether he was advised by police that his license would be suspended if he refused the test, what he thought would happen if he refused the test, and whether he considered what effect a license suspension might have on his job. The ALJ should ask claimant to explain more fully why he chose to plead guilty to DUII when he believes he did not commit the crime. The ALJ should also ask claimant any other questions she deems necessary to development of a full record on claimant's willful or wanton negligence, allow cross-examination by the employer, and ask the employer any other questions she deems necessary to development of the record, including inquiring with both about whether claimant's conduct is excusable under OAR 471-030-0038(3)(b).

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 should be disqualified from receiving benefits because of his work separation from the employer, Hearing Decision 17-UI-74665 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-74665 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-74665 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: February 6, 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.

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