

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0171

Reversed
No Disqualification

PROCEDURAL HISTORY: On December 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 104053). Claimant filed a timely request for hearing. On January 25, 2017, ALJ Seideman conducted a hearing, and on January 27, 2017 issued Hearing Decision 17-UI-75563, affirming the Department's decision. On February 8, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which he first contended that the ALJ improperly excluded his wife from testifying as a witness at hearing. However, a review of the record shows that the ALJ was quite willing to allow testimony from claimant's wife, but claimant declined to examine her. Transcript at 31. In light of EAB's disposition of the matter in claimant's favor, EAB need not and does not further address this or other contentions presented in claimant's argument. EAB also considered only evidence in the hearing record when reaching this decision.

EAB did not consider the employer's written argument since the employer failed to certify that it provided a copy of the argument to claimant as required by OAR 471-041-0080 (October 29, 2006)

FINDINGS OF FACT: (1) Penser North America, Inc. employed claimant as a truck driver from March 14, 2005 until October 27, 2016.

(2) The employer expected claimant to drive the employer's trucks safely and to refrain from having preventable accidents with the trucks. Claimant understood the employer's expectations as a matter of common sense.

(3) On December 10, 2015, claimant struck a fence post while operating one of the employer's trucks. The employer determined that claimant could have avoided the accident if he had been more careful, issued a written warning to him for having a preventable accident, and required him to participate in remedial training in the safe operation of the employer's trucks. On September 30, 2016, a truck that

claimant was attempting to maneuver onto scales struck a protrusion from the scales, and the driver's side stairs on the truck were damaged. The employer determined claimant could have avoided the accident if he had been more careful, issued a warning to him for involvement in a preventable accident, and required him to participate in remedial training.

(4) On October 17, 2016, at approximately 6:45 a.m., claimant was driving one of the employers' trucks on a freeway when he missed a turn-off he had intended to take. At that time, it was dark, raining heavily and visibility was obscured. The truck that claimant was driving had four axles and was hauling a trailer that was fifty-three feet long. A short distance down the road, claimant observed a fueling station at which he could his truck around and proceed back to the missed turn-off. Claimant entered the fueling station's lot and drove around a fuel island to allow him to re-enter the roadway and drive back to the missed turn-off. As claimant drove around the island, the trailer on his truck swung wide and struck a utility pole that was located two or three feet beyond the paved edge of the fuel station lot. Claimant had not seen the pole before the trailer struck it. After striking the pole, claimant edged the truck forward to free it from the pole and severed the pole. As a result of severing the pole, the fuel station lost all of its electrical power. As a result of the accident, the trailer was a total loss, as was the cargo in the trailer. The employer also paid \$10,289.43 to the utility company for the damage to the utility pole and approximately \$4,000 to the fuel station for the interruption to its business operations caused by the loss of power.

(5) On October 17, 2016, the employer suspended claimant for the accident that day. On October 27, 2016, the employer discharged claimant because he had been involved in a preventable accident with the truck on October 17, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude 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. 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 demonstrate claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-75563, the ALJ concluded that claimant's involvement in the accident on October 17, 2016 was the result of misconduct and he was disqualified from benefits. Despite claimant's explanation that he did not see the utility pole before his truck struck it, the ALJ reasoned that "as a truck driver [claimant] had the obligation to see where he was going and be careful to avoid striking any objects. A driver has the responsibility to be familiar with his surroundings in any weather condition." Hearing Decision 17-UI-75563 at 3.

The ALJ's statement defining claimant's obligations was apparently derived from the general standard of exercising reasonable care applicable in tort actions. However, to establish that claimant's behavior disqualified him from receiving unemployment benefits it must be shown that the behavior that caused claimant's truck to strike the utility pole on October 17, 2016 was more than merely negligent, that it was a willful or wantonly negligent violation of the employer's standards. This, in turn, required the employer to demonstrate at a minimum that at the time of the actions that gave rise to the accident, claimant was "conscious" of his conduct and aware or reasonably aware that it probably would lead an accident. *See* OAR 471-030-0038(1)(c). It was not disputed at hearing that claimant did not see the utility pole before he struck it, and there was no evidence that willful or wantonly negligent behavior caused him to fail to observe the pole as might have occurred, for example, if claimant was driving his truck recklessly or when impaired or at excessive speeds before striking the pole. Transcript at 28, 30. An inadvertent failure to exercise reasonable care, an accident, a mistake or a lapse in attention or observation of which claimant was not aware at the time of his actions is not, by definition, accompanied by the requisite mental state to establish the willful or wantonly negligent behavior that will disqualify claimant from benefits. On this record, the employer failed to demonstrate that willful or wanton negligence led to claimant's involvement in the truck accident on October 17, 2016.

Although the employer discharged claimant, it did not show that the discharge was for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-75563 is set aside, as outlined above.

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

DATE of Service: March 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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