

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0177**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On November 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110644). Claimant filed a timely request for hearing. On December 7 and January 11, 2017, ALJ Vincent conducted a hearing. On January 23, 2017, ALJ Triana, having reviewed the record, issued Hearing Decision 17-UI-75211 in ALJ Vincent's stead since he was unavailable, and reversed the Department's decision. On February 10, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained new information about the employer's substance abuse policy that was not presented at the hearing. The employer did not explain why it failed to submit this information during the hearing and failed to show that factors or circumstances beyond its reasonable control prevented it from doing so as required by OAR 471-041-0090 (October 29, 2006). Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing when reaching this decision.

**CONCLUSIONS AND REASONS:** Hearing Decision 17-UI-75211 is reversed and this matter is remanded for further development of the record.

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. Isolated instances of poor judgment, good faith errors, unavoidable accidents, absences due to illness or other physical or mental disabilities, or mere inefficiency resulting from lack of job skills or experience are not misconduct. OAR 471-030-0038(3)(b).

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(A) provides, in relevant part, that an individual is considered to have committed a disqualifying act when the individual fails to comply with the terms and conditions of a reasonable written policy established by the employer or through collective bargaining that governs the use, sale, possession or effects of drugs or alcohol in the workplace. ORS 657.176(9)(a)(A). ORS 657.176(9)(a)(D) provides that an individual has committed a disqualifying act when the individual is under the influence of intoxicants while performing services for the employer. ORS 657.176(9)(a)(E) provides that an individual has committed a disqualifying act when the individual possesses a drug unlawfully or in violation of the employer's reasonable written policy during work. For purposes of ORS 657.176(9), "drug" means a controlled substance as defined in ORS 475.005. ORS 657.176(13)(b).

For purposes of ORS 657.176, OAR 471-030-0125 (March 12, 2016) establishes policy for adjudicating cases involving the use, sale, possession or effects of drugs or alcohol in the workplace. OAR 471-030-0125(1). For purposes of ORS 657.176(9)(a)(A), "workplace" means the employer's premises or any place at or in which an individual performs services for the employer or otherwise acts within the course and scope of employment. OAR 471-030-0125(2)(a). For purposes of ORS 657.176(9)(a), an individual is "under the influence" of intoxicants if, at the time of a test administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, the individual has any detectable level of drugs or alcohol present in the individual's system, unless the employer otherwise specifies particular levels of drugs or alcohol in its policy or collective bargaining agreement. "Performing services for the employer" as used in ORS 657.176(9)(a)(D), and "during work" as used in ORS 657.176(9)(a)(E) mean that an employee is on duty and is, or is expected to be, actively engaged in tasks as directed or expected by the employer for which the employee will or expects to be compensated with remuneration. OAR 471-030-0125(2)(d). OAR 471-030-0125(3) states, in relevant part, or purposes of ORS 657.176(9)(a) a written employer policy is reasonable if the policy prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, the employer follows its policy, and the policy has been published and communicated to the individual or provided to the individual in writing.

In Hearing Decision 17-UI-75211, the ALJ found as fact that the employer discharged claimant for "committing illegal acts in connection with employment."<sup>1</sup> More specifically, the ALJ found that the employer discharged based, in part, on information that claimant received a prescription medication from a prior employee at the employer's workplace, bought prescription medication from a coworker, gave a coworker some prescription medication, and conducted service calls for the employer while abusing a prescription medication.<sup>2</sup> The ALJ further found that the employer discharged claimant, in part, based on claimant's admissions that he received a prescription medication from a coworker at the coworker's residence, received a prescription medication from a coworker not on employer property, and gave a coworker prescription medications on the weekend.<sup>3</sup> Finally, the ALJ found that the

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<sup>1</sup> Hearing Decision 17-UI-75211 at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

employer had a written drug and alcohol policy that applied to any employees who held a commercial driver license (CDL), which claimant held in connection with his employment, and that prohibited the use or distribution of drugs in the workplace.<sup>4</sup>

Based on those findings, the ALJ determined that the employer discharged claimant because it believed that he committed the illegal acts of delivery and receipt of prescription medications with his coworkers on multiple occasions at the employers' workplace, and that because the employer had a drug and alcohol policy, the provisions of the Department's drug and alcohol adjudication policy therefore are applicable in this case, which is properly adjudicated under those provisions.<sup>5</sup> The ALJ further determined that because no evidence was presented at hearing to show if the employer's drug and alcohol policy was ever provided to claimant or that the employer followed its own policy, the employer failed to establish that its possible was reasonable under OAR 471-030-0125(3), or therefore that claimant committed a disqualifying act under ORS 657.176(9)(a).<sup>6</sup>

We agree with the ALJ that the employer discharged claimant, in part, because it believed that he committed the illegal acts of delivery and receipt of prescription medications with his coworkers at the employers' workplace. We also agree that because the employer had a written drug and alcohol policy, the provisions of the Department's drug and alcohol adjudication policy are applicable to that reason for claimant's discharge. We also agree that the employer failed to show its policy was reasonable under OAR 471-030-0125(3), or therefore that claimant committed a disqualifying act under ORS 657.176(9)(a)(A) or ORS 657.176(9)(a)(D), or that he possessed a drug unlawfully in violation of the employer's *reasonable* written policy during work. And because we find the evidence as to whether claimant possessed a drug unlawfully during work, at best, equally balanced, the employer also failed to establish that claimant committed a disqualifying act under ORS 657.176(9)(a)(E). Thus, to the extent the employer discharged claimant because it believed that he committed the illegal acts of delivery and receipt of prescription medications with his coworkers at the employers' workplace, it failed to establish that he committed a disqualifying act under the provisions of the Department's drug and alcohol adjudication policy.

As the ALJ found, however, the record shows that the employer also discharged claimant, in part, based on his admissions that he received a prescription medication from a coworker at the coworker's residence, received a prescription medication from a coworker not on employer property, and gave a coworker prescription medications on the weekend. While the employer initially asserted at hearing that it believed claimant had exchanged the OxyContin, Oxycodone and methadone prescription medications at issue with his coworkers in the workplace, the crux of its reasoning in discharging claimant was not necessarily that these exchanges took place at the workplace but that that claimant was indicted by a Lane County Grand Jury for felony crimes arising from them, which it considered to be criminal activity in violation of its code of conduct. Exhibit 1 at 2. Accepting the accuracy of claimant's testimony at hearing that he never exchanged any prescription drugs on the workplace premises, no moneys or things of value ever changed hands when the drugs were exchanged off duty and away from the workplace and

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 4.

he was never was impaired while at work, his admitted behavior would still have constituted felony crimes under Oregon law. 21 CFR §1308.12 (b)(xiii) (oxycodone and OxyContin are Schedule II controlled substances); 21 CFR §1308.12(c)(15) (methadone is a Schedule II controlled substance); ORS 475.752(1)(b) (it is a class B felony to deliver a Schedule II controlled substances to a person if one is not authorized to do so, with no requirement that consideration be received for the delivery); ORS 475.752(3)(a) (it is a class C felony to possess a Schedule II substance without a prescription or other authorization, with no requirement that the substance was purchased for consideration).

ORS 657.176(9)(A) and (E) and OAR 471-030-0125(1) state that the Department's drug and alcohol adjudication is to be applied in cases involving "the use, sale, possession or effects of drugs or alcohol in the workplace" and, conversely, OAR 471-030-0125(10) states that if an employee is discharged or suspended because of the "use, sale or possession of drugs or alcohol in the workplace" and the employer had no written policy regarding the use, sale or possession of drug or alcohol in the workplace, the provisions of OAR 471-030-0038 apply. These provisions all appear to require some direct nexus between the workplace and the controlled substance before concluding that the employer's drug and alcohol policy, if one exists, is the exclusive means for determining if claimant should be disqualified from benefits as a result of activities implicating controlled substances. Here, accepting claimant's hearing testimony as accurate, there is no such direct connection between the controlled substances that claimant exchanged and the workplace. Therefore, the ALJ erred in concluding that OAR 471-030-0125 was exclusively applicable to claimant's claim, and that the employer could not show claimant was disqualified from benefits under the general misconduct provision of OAR 471-030-0038.

Because the ALJ did not think that OAR 471-030-0038 was applicable to claimant's claim, he did not develop the evidence sufficiently to allow us to determine whether or not claimant was disqualified from benefits under that rule. On remand, the ALJ should inquire about the specific language of the employer's code of conduct that prohibited claimant from engaging in criminal behavior, whether the prohibited behavior included the crimes for which claimant was indicted, whether that prohibition extended to off-duty behavior that took place away from the workplace, and whether that prohibition extended to any behavior that was unlawful or only to crimes of which an employee was convicted. The ALJ should also further develop the evidence about whether claimant's alleged criminal behavior was "connected with work," including the employer's basis, if any, for believing that claimant's involvement in criminal activity would have an impact on claimant's ability to perform his job duties or on some other aspects of the workplace when it happened off site and off duty, and what those impacts would be. The ALJ should also inquire into whether claimant was or reasonably should have been aware of the prohibition against off-duty criminal activity in the employer's code of conduct, and how this prohibition was communicated to claimant. In addition, the ALJ should obtain a specific description of the crimes for which claimant was indicted and learn if claimant has or had a defense to these criminal charges and what that defense is or was. Finally, the ALJ should explore the current status of the criminal matters that were pending at the time of the December 7, 2016 hearing, and if they have been resolved, what the resolution was and why that particular resolution was reached. Absent inquiries like those above, EAB cannot determine whether claimant was or was not discharged for misconduct under OAR 471-030-0038.

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 claimant was discharged for misconduct under OAR 471-030-0038, Hearing Decision 17-UI-75211 is reversed, and this matter remanded for further development of the record.

**DECISION:** Hearing Decision 17-UI-75211 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** March 23, 2017

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-75211 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](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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