EO: 200
BYE: 201807

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
2017-EAB-0676

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 161412). Claimant filed a timely request for hearing. On April 25, 2017, ALJ Monroe conducted a hearing, continued on May 10, 2017, and on May 16, 2017, issued Hearing Decision 17-UI-83545, concluding the employer discharged claimant, but not for misconduct. On June 5, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer's written argument contained information that was not offered into evidence during the hearing and did not explain why it was unable to present the information at that time or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so, although it implied it did not offer the information because the ALJ did not want the hearing "to continue to drag on." Written Argument at 2. However, the transcript shows that the ALJ gave the employer an opportunity to present any information it wished at hearing. Transcript at 49.[1] Accordingly, under ORS 657.275(2), OAR 471-041-0080 and OAR 471-041-0090, EAB only considered the hearing record and the employer's written argument, to the extent it was based on the record, when reaching this decision.

FINDINGS OF FACT: (1) PS Trucking, Inc. employed claimant as a dockworker from March 15, 2016 to February 21, 2017.

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[1] ALJ MONROE: Okay. All right. Well, thank you. I don't have any additional questions for the parties. I do understand that there are some disputed issues and facts in this case. But I have a good understanding of what those are and what the party's perspectives are in this matter. So I would be inclined to conclude the hearing at this time. I would like to just check in with each person before I do so in order of testimony. Mr. Darnall (employer witness), is there anything else you'd like to add in terms of testimony or any other questions you're like to ask any of the witnesses before we conclude today?

MR. DARNALL: Actually we're running out of time. I was going to have Ed testify as to his conversation with Mr. Rodgers, but we – I don't think it's – I think you've got enough information there.

(2) The employer had a policy that required dockworkers to correctly load freight in accordance with its loading procedures. Under the policy, the employer expected its dockworkers to ensure the accuracy of a shipment by examining the label affixed to the freight and verifying the label information against a corresponding shipping manifest. In the event a dockworker had any question about a shipment, the dockworker was expected to consult with a supervisor or manager. Claimant underwent the employer's dockworker training and understood the employer's policy and expectations.

(3) On July 21, 2016, the employer issued a warning to claimant for violating its policy by failing to clean out a trailer after unloading it, and on October 12, 2016, the employer issued a warning to claimant for carelessly failing to load the full shipment of pallets intended for a scheduled delivery.

(4) On February 17, 2017, the employer assigned claimant the task of loading a shipment, bound for the Eugene location of Franz Bakery, into the truck designated for Eugene delivery points. An employer manager instructed claimant to load certain freight intended for delivery to Franz Bakery, which he described to claimant as six oversize pallets of green and white bags of food grade product, a certain way, based on the size and shape of the pallets. Claimant located six such pallets, and when inspecting the shipment for damage, observed the word "Franz" written on the outside of the freight with a marker. Transcript at 19. Claimant did not see any labels or other identifying information on the pallets and did not receive a bill of lading or shipping manifest associated with the shipment. At the time claimant loaded the pallets into the Eugene-bound truck, he had no questions about the accuracy of the shipment he was loading and believed he had loaded the pallets correctly. Unbeknownst to claimant, he had loaded freight intended for the Spokane location of Franz Bakery into the truck bound for Eugene. The loading error was not discovered until the truck arrived in Eugene, requiring the employer to incur additional expense, delaying delivery of the shipment and jeopardizing the employer's account with the customer.

(5) On February 21, 2017, the employer discharged claimant for "unsatisfactory work quality" and "carelessness" stating, "In light of two previous write-ups for unsatisfactory work quality in the past seven months, as well as the magnitude of this [02/17/17] incident, employment with PS Trucking, Inc. is terminated." Exhibit 1.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but 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. In a discharge case, the employer bears the burden to establish claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer discharged claimant based on the combination of the incidents from July 21, 2016, October 12, 2016, and February 17, 2017, the proximate or "but-for" cause of his discharge was the misloaded Franz shipment of February 17, 2017. Accordingly, that incident is the focus of our misconduct analysis.

Claimant is disqualified from receiving unemployment benefits only if the record shows that claimant's misloading error was the result of willful or wantonly negligent behavior. *See* OAR 471-030-0038(3)(a). The employer did not contend, and there is no evidence in the record suggesting, that claimant's failure to correctly load the Eugene Franz shipment was intentional. Therefore, the issue is whether the employer established that claimant's misloading error on February 17 was the result of wanton negligence.

A finding that claimant's misloading error was wantonly negligent requires evidence that the error was a conscious one. *See* OAR 471-030-0038(1)(c). An *un*conscious error is, at most, evidence of negligence or the failure to exercise due care. Mere negligence, even repeated negligence, in the performance of work-related duties, may be a valid basis for discharge, but it is not sufficient to establish misconduct under OAR 471-030-0038(1)(a). The question is not whether claimant was conscious that he was loading a shipment intended for the Eugene Franz location, or that he was aware that the employer expected him to do so accurately in accordance with its procedures. The question is whether claimant was consciously indifferent to the fact that he may have been failing to follow the employer's loading procedures while he was engaged in that activity.

At hearing, claimant testified that when he inspected the freight for damage, all that he saw was six pallets of green and white bags of food grade product, as his manager had described them, and that the pallets were labeled "Franz." Moreover, he did not see any labels or other identifying information that would have caused him to question whether he was loading the correct shipment. Transcript at 42. He also asserted that that when he inquired of the office manager in charge about the freight to be loaded and how to load it, he was in the employer's office, where the bills of lading were kept, and the manager did not provide him with one to verify the correctness of the load. Transcript at 21-25. Viewing the record as a whole, we infer, based on the surrounding circumstances and claimant's testimony, that he did not know, or even suspect, that he may have been loading the wrong pallets. Accordingly, we conclude that there is insufficient evidence in the record to establish that claimant's asserted violations of the employer's expectations were the result of conscious conduct or indifference.

On this record, we cannot find that the conduct for which claimant was discharged was either willful or wantonly negligent. For the reasons discussed above, the employer discharged claimant, but not for misconduct as defined by OAR 471-030-0038(3)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-83545 is affirmed.

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

DATE of Service: <u>July 6, 2017</u>

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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