EO: 200
BYE: 201818

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

348
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0774

Reversed
No Disqualification
(No Descalificación)

PROCEDURAL HISTORY: On May 19, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 120338). Claimant filed a timely request for hearing. On June 19, 2017, ALJ Meerdink conducted a hearing, and on June 20, 2017, issued Hearing Decision 17-UI-86060, affirming the Department's decision. On June 28, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Esco Corporation employed claimant, last as a metal finishing machine operator, from February 10, 1997 to May 5, 2017.

(2) The employer expected its machine operators to perform a safety practice that it referred to as "lock out- tag out" (LO/TO) – a practice that included cutting off the energy source to the machine – during routine maintenance, such as when changing sanding belts. Audio Record ~ 9:15 to 10:00. In April 2017, after a machine operator failed to perform the LO/TO practice when required, the employer held a refresher course for all of its machine operators which emphasized the importance of the LO/TO practice. Claimant was aware of and understood the employer's expectation.

(3) On May 4, 2017, an employee reported that an employee in claimant's work area was not was not performing the LO/TO practice when required. A safety manager reviewed a video of claimant's work area and reported to the employer that during the course of claimant's 10-hour day, claimant had performed the LO/TO practice on one machine 6 of 10 times and on another none out of four times. The next day, the employer called claimant in, showed him a short video showing that claimant had failed to perform the LO/TO procedure at least once, and then terminated him for violating it's LO/TO policy several times on May 4. When questioned by the employer, claimant explained that he "must have forgotten" to perform the LO/TO procedure that day. Audio Record at 14:15; 31:00 to 32:00.

(4) During the twenty years of claimant's employment prior to May 4, 2017, the employer had never disciplined claimant for violating a safety practice.

CONCLUSIONS AND REASONS: We disagree 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.

As a preliminary matter, claimant's first-hand testimony about the facts that led to his discharge differed from the testimony of the employer's human resources representative, which was based largely on hearsay, including the alleged contents of the videotape, which was not offered into evidence. In the absence of evidence demonstrating that claimant was not a credible witness, his first hand testimony was at least as credible as the employer' s hearsay. Where the evidence is no more than equally balanced, the party with the burden of persuasion – here, the employer -- has failed to satisfy its evidentiary burden. Consequently, on matters in dispute, we based our findings on claimant's evidence.

In Hearing Decision 17-UI-86060, after finding that on May 4, 2017, claimant failed to perform the LO/TO procedure 8 out of 14 times, the ALJ concluded that the employer discharged clamant for misconduct, reasoning,

> Although claimant asserted that he "forgot" to utilize the proper procedure, this is unpersuasive. He "remembered" approximately one-half of the time. He also testified that he felt a strong push from his lead worker to improve production. These statements detract from his assertion of forgetting. For these reasons, his failure to follow the safety procedure was, more likely than not, a willful decision to ignore the employer's policies.

Hearing Decision 17-UI-86060 at 2, 4. We disagree.

The employer discharged claimant for allegedly failing to perform it's LO/TO procedure multiple times on May 4, 2017. The employer had the right to expect claimant to adhere to the procedure when performing routine maintenance on any metal finishing machine he was operating. Claimant understood the employer's expectation, and on May 4, 2017, violated it when he failed to perform the procedure on a machine he had used prior to changing the sanding belt between one and four times during his 10-hour shift. At hearing, the employer asserted that claimant failed to perform the LO/TO procedure that day, first 8 out of 14 times and later 10 out of 20 times. Audio Record ~ 14:15 to 15:15. Claimant asserted that on the date of his discharge, he was shown a short videotape that showed he failed to perform the procedure at least once, but possibly also three other times during his ten-hour shift. Audio Record ~

31:00 to 32:00. However, he also asserted that he remembered that his "machine was off" when he performed the procedure, but that if he failed to do so, it was only because he "forgot." *Id.* He also explained that the employer had put him under a lot of pressure to increase his production that day. Audio Record ~ 29:00 to 32:00. Although the ALJ inferred from that testimony that claimant must have willfully chosen to ignore the procedure to increase his production, it is equally plausible that the pace of his work caused him to forget to perform the procedure one to four times during his 10-hour shift, especially considering his exemplary safety record during the 20 years of his employment. On this record, the evidence that claimant consciously violated the employer's LO/TO procedure one or more times on May 4, 2017 was no more than equally balanced. Accordingly, the employer failed to meet its burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of his work separation.

DECISION: Hearing Decision 17-UI-86060 is set aside, as outlined above.[1] *Decisión de la Audiencia 17-UI-86060 se deja a un lado, de acuerdo a lo indicado arriba.*

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

DATE of Service: <u>July 31, 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.

<u>Please help us improve our service by completing an online customer service survey</u>. 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.

***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records*

[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete. *Esta decisión revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios dias a dos semanas para pagar los beneficios astrasados.*

Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en ***courts.oregon.gov****. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atencion al cliente. *Para llenar este formulario, puede visitar* https://www.surveymonkey.com/s/5WQXNJH. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*