

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0856

Reversed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 121427). Claimant filed a timely request for hearing. On July 6, 2017, ALJ Lease conducted a hearing and issued Hearing Decision 17-UI-87390, affirming the Department's decision. On July 17, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Marten Transport Ltd. employed claimant as a truck driver from August 3, 2015 until February 24, 2017. The combined length of the tractor and box trailer that claimant drove for the employer was over 70 feet.

(2) The employer expected claimant to refrain from driving his truck negligently or in ways that caused preventable accidents. Claimant understood the employer's expectations.

(3) On September 21, 2016, claimant backed his trailer into a parked truck while driving his truck on the employer's lot, which caused damage to the truck. On October 6, 2016, claimant lowered the landing gear on his trailer in preparation for leaving the trailer behind. Claimant then drove away from the trailer without disconnecting the air hose and electrical lines, which caused damage to them. Around this time, an employer representative advised claimant to "pay better attention to what [he] was doing" to avoid damaging the employer's trucks and trailers. Audio at ~34:34.

(4) On February 22, 2017, claimant was delivering a load of lumber to a lumberyard. Because claimant was hauling a box trailer, rather than a flatbed trailer, he was required to back the trailer up to a dock for unloading with a forklift. The configuration of the entry to the dock was tight, with little room on either side of claimant's trailer, and claimant's truck and trailer were sharply angled to allow the rear of the trailer to reach the loading dock. Claimant was unable to see the dock or obstacles in the path of the trailer using the truck's rear and side mirrors while backing in. Claimant got out of the truck in an attempt to visually determine if there were obstacles or hazards in the trailer's path to the loading dock.

There was very limited clearance either side of the trailer and claimant was not able to see the truck's path unless he walked up a side ramp that led up to the loading dock, which would elevate his view. As claimant began walking up the side ramp to make a visual inspection, an employee of the lumberyard told claimant that as a driver he was not allowed either on the ramp or the dock, but that the employee would act as a spotter, giving claimant oral instructions that guided claimant along the trailer's path to the loading dock. Claimant returned to his truck and, with the lumberyard employee's assistance, began backing up the trailer up to the loading dock. As the rear of trailer reached the dock, it struck a portable dock plate on the loading dock. The employee acting as claimant's spotter had not been able see the dock plate from the vantage point at which he had been standing while giving directions to claimant. As a result of striking the dock plate, the trailer that claimant had been backing in was damaged.

(5) On February 24, 2017, the employer discharged claimant because the employer determined that, as a result of the accident on February 22, 2017, claimant had been involved in too many preventable accidents.

CONCLUSIONS AND REASONS: 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. The employer carries the burden to show 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-87390, the ALJ determined that claimant's wanton negligence led to the February 22, 2017 accident. Although the ALJ acknowledged that the configuration of the lumberyard might have contributed to that accident as well as the instructions that claimant received from the employee acting as his spotter, she reasoned that claimant's "failure to perform appropriate visual inspections, both before and during the maneuver" when claimant "knew or should have known that failing to perform such visual inspection might result in an accident" was at least a wantonly negligent violation of the employer's expectations. Hearing Decision 17-UI-87390 at 3. We disagree.

While we agree with the ALJ that the February 22, 2017 accident might have been avoided had claimant been able to visually inspect the pathway to the loading dock and the loading dock itself before he backed the trailer in, claimant's testimony was quite clear that he tried to do so and a lumberyard employee forbade him from access to the ramp leading to the loading dock and dock itself. Audio at ~24:39, ~27:06, ~29:05. That the lumberyard employee refused to allow claimant to go onto the side ramp or the loading dock was not disputed at hearing, nor was it disputed that, in light of the narrow confines of the pathway leading to the loading dock and the width of claimant's trailer, the only vantages from which claimant could obtain an unobstructed view of any obstacles to and clearances available for the trailer was from the side ramp and the loading dock. Audio at ~24:39, ~29:05.

Because claimant tried and was denied access to the very areas from which he might have made an appropriate visual inspection before backing the trailer up to loading dock or during that maneuver, it does not appear to us that claimant's failure to perform make such an inspection was wantonly negligent. As well, absent evidence that claimant had reason to suspect that the spotter would not provide accurate directions to him or that the spotter was not able to observe all obstructions and clearances and alert him to them, it also does not appear to us that claimant's reliance on the spotter's directions while backing the trailer in was wantonly negligent. On this record, there is no evidence that claimant was consciously aware before or when he was backing up the trailer to the loading dock on February 22, 2017 that he possibly was going to damage the truck, trailer or dock plate or that he was consciously indifferent to this possibility. The employer did not meet its burden to show that claimant's behavior on February 22, 2017 was in willful or wantonly negligent disregard of the employer's standards and that it constituted misconduct.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 17-UI-87390 is set aside, as outlined above.

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

DATE of Service: August 14, 2017

NOTE: 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.

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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