EO: 200
BYE: 201822

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

432
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0910-R

On Reconsideration, Hearing Decision 17-UI-88750 Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 23, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 161349). Claimant filed a timely request for hearing. On July 20, 2017, ALJ Murdock conducted a hearing, and on July 24, 2017, issued Hearing Decision 17-UI-88750, concluding the employer discharged claimant, but not for misconduct. On July 31, 2017, the employer filed an application for review with the Employment Appeals Board (EAB). On August 22, 2017, EAB issued Appeals Board Decision 2017-EAB-0910, affirming the hearing decision. On August 29, 2017, the employer filed a timely request for reconsideration of EAB Decision 2017-EAB-0910.

CONCLUSIONS AND REASONS: The employer's request for reconsideration is allowed and EAB Decision 2017-EAB-0910 is adhered to on reconsideration.

EAB has the authority to reconsider any of its previous decisions as necessary and appropriate for the correction of previous error of fact or law. *See* ORS 657.290(3); OAR 471-041-0145(1) (October 29, 2006). The employer's request is not subject to dismissal because included a statement that a copy of the request was provided to claimant and was filed on or before the 20th day after the decision sought to be reconsidered was mailed. OAR 471-041-0145(2). The employer's request is allowed because it identified an error of fact in EAB Decision 2017-EAB-0910, specifically, that EAB decided not to review the employer's written argument based upon the erroneous conclusion that the employer had failed to certify that a copy of the argument was provided to claimant as required under OAR 471-041-0080(2)(a) (October 29, 2006). The employer did, in fact, certify in its written argument that it provided a copy of the argument to claimant. We therefore reconsider our decision in this matter based upon a proper analysis of the employer's written argument.

We ruled in EAB Decision 2017-EAB-0910 that Exhibit 1 was admitted into evidence. Exhibit 1 consisted of 12 pages of policy materials, including a safety and health policy and acknowledgment, mechanic and rock crusher training guides and acknowledgement, a hazard awareness training guide and acknowledgment, and a MSHA refresher training sheet. To the extent the employer's written argument included duplicate copies of the materials already provided into evidence, EAB considered the contents

of Exhibit 1 when reaching its decision in this matter. EAB also considered the employer's two-page argument narrative to the extent it was based upon evidence already in the hearing record.

The employer submitted additional materials to EAB with its written argument, however, including: a one-page narrative (undated, unattributed) explaining the reasons for claimant's discharge; an August 21, 2017 statement signed by the employer's foreman and president; a January 14, 2014 employee incident/disciplinary action form; a January 21, 2014 memo documenting a discussion; accident/employee incident/disciplinary action forms dated December 2, 2015, February 16, 2016, April 19, 2016, December 1, 2016, and April 7, 2017; copies of two June 7, 2017 mine citation orders; and copies of 30 CFR §§ 56.14207 and 56.15004. The record fails to show that those materials were submitted to the ALJ for use during the July 20th hearing, and the employer's written argument appears to acknowledge that only the 12 pages described as Exhibit 1 were actually provided for use during the July 20th hearing. Those materials were, therefore, additional evidence.

Under limited circumstances, EAB may admit additional evidence into the record. The information must be relevant and material to EAB's determination, which it appears to be the case here. *See* OAR 471-041-0090(2)(a). However, the employer must also have shown that "[f]actors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing." OAR 471-041-0090(2)(b); *see also* August 1, 2017 Notice of Receipt of Application for Review, page 2. We have reviewed the employer's original written argument and request for reconsideration and can find nothing suggesting that factors or circumstances beyond the employer's reasonable control prevented it from offering the additional information into evidence during the hearing. For that reason, the additional evidence excluded.

Even if we had considered the additional evidence the outcome of this matter would likely remain the same. The proximate cause of the employer's decision to discharge claimant were three incidents that occurred on June 7th. The employer had the burden to prove by a preponderance of the evidence that, with respect to one or some of those incidents, claimant acted willfully or with wanton negligence when he violated the employer's expectations or standards of behavior. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). With regard to each of the incidents, however, the employer provided only hearsay about what was observed of his conduct, whether in the form of the employer's witness's testimony about events she did not observe firsthand, or the written statements in the additional evidence written by individuals who did not testify and could not be examined about their observations on the date in question. The employer's hearsay therefore did not outweigh claimant's sincere firsthand account of those events. At most, the employer showed that claimant's conduct on June 7th might have violated the employer's expectations or standards of behavior; as explained in Hearing Decision 17-UI-88750, however, the additional evidence did not establish that claimant's actions were knowing, willful or with wanton negligence, and therefore misconduct was not established.

EAB reviewed the entire hearing record, as well as the employer's written argument narrative and Exhibit 1. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review on reconsideration is **adopted**.

DECISION: On reconsideration, Hearing Decision 17-UI-88750 is affirmed.

J. S. Cromwell and D. H. Hettle.

DATE of Service: September 11, 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.

Please help us improve our service by completing an online customer service survey. 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.