

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0979**

*Hearing Decision 17-UI-89562 Affirmed ~ No Disqualification*  
*Hearing Decision 17-UI-89300 Affirmed ~ Ineligible Weeks 23/17 through 29/17*

**PROCEDURAL HISTORY:** On June 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 171122). On June 29, 2017, the Department served notice of another administrative decision, concluding that claimant was not able to work from June 4 through July 22, 2017 (decision # 173840). Claimant filed timely requests for hearing on both decisions. On August 1, 2017, ALJ Seideman conducted a hearing regarding decision # 171122 and issued Hearing Decision 17-UI-89562, concluding the employer discharged claimant, but not for misconduct. Also on August 1, 2017, ALJ Meerdink conducted a hearing regarding decision # 173840 and issued Hearing Decision 17-UI-89300, affirming the Department's decision. On August 14, 2017, the employer and claimant filed applications for review with the Employment Appeals Board (EAB) regarding Hearing Decisions 17-UI-89562 and 17-UI-89300, respectively.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-89562 and 17-UI-89300. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0979 and 2017-EAB-0980).

EAB considered the records of both hearings and claimant's written argument. However, claimant's written argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information during the hearing. 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.

**FINDINGS OF FACT:** (1) Columbia Rubber, LLC employed claimant from July 18, 2016 to June 5, 2017 as a roll wrapper in its rubber products manufacturing plant.

(2) The employer expected claimant to avoid engaging in behavior that would cause accidents and risk employees' safety. Claimant was aware of the employer's expectations as a matter of common sense and from warnings advising him to avoid safety violations.

(3) Prior to June 5, 2017, claimant was spotting for a coworker who was using a forklift. Claimant's duty was to tell the coworker when the forklift forks were adequately placed under a roll of product so the coworker could pick up the roll with the forklift. Due to human error at the time the coworker lifted the forklift, the roll flipped up and fell.

(4) At the time of the accident, claimant was experiencing low hormone levels that caused forgetfulness and inattentiveness.

(5) On June 5, 2017, the employer discharged claimant for a safety violation.

(6) On June 6, 2017, claimant filed an initial claim for unemployment benefits. Claimant claimed benefits for the weeks of June 4, 2017 through July 22, 2017 (weeks 23-17 through 29-17), the weeks at issue. When claimant submitted his claim online, claimant reported that he was unable to accept full time work because his vehicle was not equipped to carry tools. The Department denied claimant benefits for those weeks.

(7) During the weeks at issue, claimant's labor market was Milwaukie, Clackamas and Southeast Portland, Oregon. During the weeks at issue, claimant was seeking work in production and commercial and residential building maintenance. The customary days and hours for work in production and maintenance work in claimant's labor market were all days and all shifts.

(8) During the weeks at issue, claimant was not willing to accept all maintenance work because he had to take tools with him to maintenance jobs and he did not have the funds to equip his truck with locks to prevent the tools from being stolen from the back of his truck while he worked.

**CONCLUSIONS AND REASONS:** We agree with the ALJs that the employer discharged claimant not for misconduct, and that claimant was not available for work during the weeks at issue.

**Discharge.** 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).

The employer discharged claimant for violating its safety expectations when a roll of product fell when claimant and a coworker were working together to lift it with a forklift. Claimant's conduct during that incident can only be misconduct if it was willful or wantonly negligent behavior. OAR 471-030-0038(3)(a). Claimant's manager testified that the accident was not attributable to willful or wantonly negligent conduct on claimant's part, and that "for whatever reason, [claimant] just didn't do it right." Audio Record at ~ 30:38. Mistakes and accidents are usually not accompanied by the state of mind

required to find willful or wantonly negligent behavior since, by its nature, a claimant is not aware or conscious of such behavior when it is occurring or that such behavior might violate the employer's standards. Moreover, claimant's evidence shows that the accident may have resulted from inattentiveness resulting from his medical condition, which was beyond his control. The employer did not show the accident resulted from willful or wantonly negligent conduct attributable to claimant. The employer therefore failed to meet its burden to show it discharged claimant for misconduct. Claimant is not disqualified from receiving benefits based on his work separation from the employer.

**Availability.** To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements are that the individual be willing to work and capable of reporting to full time, part time and temporary work opportunities throughout the labor market during all of the usual days and hours customary for the type of work the individual is seeking, and refrain from imposing conditions that limit the individual's opportunities to return to work at the earliest possible time. *Id.*

Claimant testified that he did not have the resources to put the locks he needed on his truck during the weeks at issue, thus limiting his availability for maintenance work that required more than a limited amount of tools. Audio Record at ~ 18:23, ~ 25:19. Because claimant's inability to secure his tools resulted in him not being able to report for all potential maintenance work opportunities throughout his labor market, claimant was not available for work from June 4, 2017 through July 22, 2017 (weeks 23-17 through 29-17).

**DECISION:** Hearing Decisions 17-UI-89562 and 17-UI-89300 are affirmed.

J. S. Cromwell and D. P. Hettle.

**DATE of Service:** September 7, 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](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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