

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0997

Reversed & Remanded

PROCEDURAL HISTORY: On June 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 114038). The employer filed a timely request for hearing. On August 3, 2017, ALJ Seideman conducted a hearing, and on August 4, 2017 issued Hearing Decision 17-UI-89614, concluding that claimant's discharge was for misconduct. On August 11, 2016, the ALJ issued Hearing Decision 17-UI-90149, amending Hearing Decision 17-UI-89614, but only to add a beginning date for claimant's disqualification. On August 18, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument that contained information that was not offered during the hearing and, in that argument, also requested that EAB contact certain people to obtain further information about the December 7, 2017 incident that led to his discharge as well as other matters. Generally, EAB does not consider new information on review unless the party offering it shows that factors or circumstances beyond its reasonable control prevented it from offering that information at the hearing. *See* OAR 471-041-0090 (October 29, 2006). However, given that EAB has remanded this matter for further development of the record, claimant may offer this information and call these people to testify as witnesses on his behalf during the hearing on remand. At that time, the assigned ALJ should consider whether that information and the testimony of those witnesses is relevant and material to the issues on remand and not duplicative of other evidence, and should decide whether or not that evidence should be admitted into the record.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-90149 is reversed and this matter is remanded for the assignment of a new ALJ and further development of the record.

In Hearing Decision 17-UI-90149, the ALJ concluded that the employer discharged claimant for misconduct, apparently based on claimant's behavior during an incident occurring on December 7, 2016. The ALJ found that claimant had used foul language to an employee and supervisors during the incident, told his direct supervisor he was not going to drive a forklift he was expected to operate, and then told the general manager that he was not going to drive the forklift. Hearing Decision 17-UI-90149 at 2. The ALJ decided that the employer had discharged claimant for working while "intoxicated" that day,

for having a “bad attitude” and for “insubordination to his peers and supervisors.” *Id.* However, there is insufficient evidence in this record to support the ALJ’s conclusion and to support any determination about whether or not claimant engaged in misconduct on December 7, 2017 or on any other date.

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. 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).

Assignment of Different ALJ. It was apparent at the hearing that claimant and the employer’s principal witness, the general manager, held animosity toward each other, with both witnesses often making unflattering comments about the other and interrupting the ongoing testimony of the other to interject their own views and commentary. Audio at ~25:44, ~25:59 ~27:58, ~29:40, ~30:00, ~38:26, ~39:00 ~40:26, ~46:18. A great deal of hearing time was taken up with the general manager’s allegations that claimant was “intoxicated” or “hung over” during the incident on December 7, 2016 and apparently on other occasions when it did not appear that claimant was discharged due to intoxication. Audio at ~16:06, ~24:55, ~25:44, ~29:40, ~30:06, ~36:01; Exhibit 3 at 1. Rather than controlling the proceedings and directing or guiding the testimony of the parties toward issues relevant to whether or not the employer discharged claimant for misconduct, the ALJ largely allowed the parties’ witnesses to address matters of their own choosing, without interruption or focused questioning.

For example, the ALJ never asked the employer’s general manager, its only fact witness, about what he recalled of the incident on December 7, 2016, but in connection with that incident only asked him if he wanted to add any facts to Exhibit 3, the disciplinary report that the general manager had prepared summarizing the incident. Audio at ~ 25:33. Rather than asking questions of claimant that would have required him to respond to the employer’s specific allegations, the ALJ merely asked him the vague question, “What do you wish to say about this?”, without further direction, focus and follow-up. Audio at ~32:24. After claimant had completed his principally self-directed testimony, the ALJ then inquired of the general manager only, “Do you have something you wish to say regarding what he [claimant] said?”, and when the general manager did not, the ALJ turned to claimant and asked only, “Anything else you wish to say?” Audio at ~38:26. Claimant’s response was to accuse the general manager of dishonesty, without any addressing any of the employer’s allegations, and the ALJ did not try to elicit a more specific and directed response from him. Audio at ~38:26. Similarly, after further testimony by the general manager, the ALJ again merely asked claimant without specific direction or focus, “Anything else you wish to say?”, to which claimant’s response was to express confusion over the timeline of text messages that were apparently sent after the December 7, 2016 incident for which he was discharged, but again not addressing the alleged facts surrounding the incident for which he was discharged. Audio at ~44:12.

The ALJ’s inability to control the hearing and the manner in which the parties participated in the hearing, and to direct the parties’ testimonies to issues relevant to reaching a legally adequate decision on whether claimant was or was not discharged for misconduct, suggest that it would be prudent and appropriate not to have the hearing on remand presided over by the same ALJ who presided at the

August 3, 2017 hearing. On remand, this matter should be assigned to a different ALJ for an adequate development of the record.

Further Development of the Record. It may be advisable for the ALJ assigned to preside over the remand hearing to conduct that hearing as if claimant's discharge were a matter of first impression. As a preliminary matter, the ALJ should directly ask the employer's general manager, or other employer representatives, to specify whether claimant was discharged for his behavior on December 7, 2016 or for any behavior that occurred prior to the incident on December 7, 2016. The ALJ should further specifically inquire whether claimant was discharged for insubordination, a bad attitude, intoxication, being hung over, or some combination of these or other factors. The ALJ should make an adequate inquiry of the employer's witness(es) to determine the proximate cause of the employer's discharge of claimant.

The ALJ also should develop the evidence as to the employer's expectations or policies that claimant allegedly violated by the behavior(s) for which he was discharged, how claimant was aware of them, how and when, if at all, they were communicated to claimant, how exactly claimant's alleged behavior violated them and when the alleged violation(s) occurred. With respect to claimant's alleged behavior on December 7, 2016, rather than exclusively relying on the disciplinary report that is Exhibit 3, the ALJ should ask the employer's general manager for a detailed verbal narrative about what happened on December 7, 2016, what he personally witnessed of the incident on December 7, 2016, what he recounted based on the observations and statements of others who witnessed some of all of that incident, and what those witnesses reported to him they had observed. The ALJ should in addition ask the general manager how he first became aware of the December 7, 2016 incident as it was unfolding and what caused him to visit the floor that day to speak with claimant. Since the general manager testified he later interviewed or took statements from many witnesses to the incident on December 7, 2016 and had a "floor full of witnesses that will give affidavits," the ALJ should inquire as to the identity of these witnesses, what specifically they reported to him about the incident and what prompted it, and the ALJ should offer the employer an opportunity to submit any written statements from those witnesses that were contemporaneously prepared, or to call a suitable number of them as witnesses at hearing to corroborate the general manager's narrative about the December 7, 2016 incident. Audio at ~31:24~38:22. The ALJ should follow up the general manager's narrative of the December 7, 2016 incident and the information from any first-hand witnesses to it, as appropriate, to determine if the behaviors of claimant that were allegedly witnessed actually constituted violations of the employer's expectations or policies. The ALJ should conduct a similar inquiry about any alleged behavior of claimant other than that on December 7, 2016 which may have proximately caused claimant's discharge.

As well, the ALJ should make a sufficient inquiry of claimant to elicit an organized, chronological and detailed narrative of what happened on December 7, 2016 from his perspective, what his behavior was that day, why he behaved as he did and whether his behavior that day actually violated the employer's expectations and policies. As appropriate, the ALJ's inquiry should draw out information about how the behavior of claimant's coworker, Cody, with respect to driving the forklift might have prompted or provoked the incident, what exactly Cody said to claimant and what claimant said to Cody and to his immediate supervisor, Bill, about Cody's behavior with the forklift, what Bill told claimant, what the general manager said to claimant when he came to the floor, what claimant said to the general manager and whether claimant was subsequently willing or unwilling to drive the forklift, with particular

attention to claimant's statements or actions that allegedly constituted an insubordinate refusal to drive the forklift, as allegedly expressed to Bill and the general manager.

In addition, the ALJ should develop the evidence about any alleged acts of willful or wantonly negligent behavior that claimant engaged in prior to the behavior for which he was discharged. The ALJ's inquiry should be sufficient to determine whether the alleged misconduct for which claimant was discharged is excusable as an isolated instance of poor judgment under OAR 471-030-0038(3)(b). Similar to that with respect to the behavior for which claimant was discharged, the ALJ should develop the evidence as to when these alleged prior acts of willful or wantonly negligent behavior occurred, the policies or expectations of the employer that were violated, how claimant was aware of these policies or expectations, claimant's specific behavior that allegedly violated the employer's expectations or policies, whether claimant's alleged behavior was accompanied by a willful or wantonly negligent state of mind, and whether the employer issued verbal or written warnings to claimant due to any alleged prior misconduct. Claimant should have the opportunity to respond in detail to the employer's allegations about any alleged prior misconduct.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was discharged for misconduct, Hearing Decision 17-UI-90149 is reversed, and this matter remanded for the assignment of a new ALJ and further development of the record.

DECISION: Hearing Decision 17-UI-90149 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: September 15, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-90149 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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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