

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1027

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 10, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 154521). The employer filed a timely request for hearing. On August 7, 2017, ALJ Lohr conducted a hearing, and on August 11, 2017 issued Hearing Decision 17-UI-90219, concluding that claimant voluntarily left work without good cause. On August 29, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

We considered claimant's written argument and the entire hearing record.

FINDINGS OF FACT: (1) C. R. England, Inc. employed claimant from September 3, 2015 to March 3, 2017 as a commercial truck driver. Claimant regularly performed over the road work for the employer, and was generally away from home for 30 days at a time. A requirement of claimant's job was that he maintains a valid commercial driver's license (CDL).

(2) The employer expected claimant to refrain from having long periods of time when he did not drive for the employer. Claimant understood this expectation.

(3) On January 7, 2017, claimant injured his knee while working. On January 8, 2017, claimant was restricted to light duty work. Claimant was not able to drive commercially while restricted to light duty work.

(4) On January 17, 2017, claimant had an episode of atrial fibrillation. Claimant had experienced rare episodes of atrial fibrillation in the past. Exhibit 2 at 9. On January 19, 2017, claimant sought medical care for the atrial fibrillation. Claimant knew his medical certificate for his CDL was going to expire on

February 11, 2017, and asked his doctor if he would be able to renew the certificate. Exhibit 2 at 5. Claimant's doctor was uncertain if claimant would be able to renew his medical certificate, and told claimant he would rely on the advice of a cardiologist. Exhibit 2 at 4. The doctor referred claimant to a cardiologist. The first appointment claimant was able to get with the cardiologist was for March 2, 2017. On February 11, 2017, claimant's medical certificate expired and claimant was not eligible to drive a motor vehicle that required a CDL. Exhibit 2 at 5.

(5) The employer had not offered claimant light duty work from January 8 until February 20, 2017. On February 20, 2017, the employer received information from claimant's knee doctor that claimant was released to regular duty and was engaged in physical therapy for his knee injury. The employer's operations manager spoke with claimant by telephone to discuss claimant's availability for work. He offered claimant over the road work. Claimant told the manager that he was not able to work until he renewed his medical certificate, which had expired, and that he would prefer to work locally rather than over the road.

(6) The employer offered claimant driving work once more before March 3 and once on March 3, 2017. The jobs were regional, and would allow claimant to return home every one to two weeks. Each time, claimant reiterated that he was not able to drive until he obtained a new medical certificate, and that he preferred local work.

(7) On March 3, 2017, the employer discharged claimant because the employer was dissatisfied that claimant had been inactive, not driving, since January 8, 2017.

CONCLUSION AND REASONS: We disagree with the ALJ, and conclude that the employer discharged claimant, but not for misconduct.

Work Separation. The first issue in this case is the nature of the work separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (August 3, 2011). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). "Work" means "the continuing relationship between an employer and an employee." OAR 471-030-0038(1)(a). An individual is separated from work when the employer-employee relationship is severed. *Id.*

In Hearing Decision 17-UI-90219, the ALJ concluded that claimant voluntarily left work because he could have continued to work for the employer, but instead declined several driving jobs offered to him by the employer from February 20 through March 3.¹ We disagree. The record shows that it was not claimant, but the employer, that acted to end the employer-employee relationship. Claimant was not able to accept the work requiring a CDL that the employer offered him between February 20 and March 3 because his medical certificate had expired, and did refuse work assignments during that time. However, although claimant told the employer he preferred local work rather than the over the road and regional work the employer offered him, claimant continued to show a willingness to work for the employer by remaining in contact with the employer about potential job opportunities and by pursuing treatment and an evaluation by a cardiologist to facilitate his receipt of a new medical certification,

¹ Hearing Decision 17-UI-90219 at 3.

which would enable him to drive again. However, the employer was not willing to allow the employment relationship to continue while claimant was inactive, unable to drive. Because claimant was willing to continue working for the employer, but the employer did not allow him to do so, the work separation was a discharge.

Discharge 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) 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. Absences due to illness or other physical or mental disabilities are not misconduct. OAR 471-030-0038(3)(b). The willful or wantonly negligent failure to maintain a license, certification or other similar authority necessary to the performance of the occupation involved is misconduct only if such failure is reasonably attributable to the individual. OAR 471-030-0038(3)(c) (August 3, 2011). 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).

Claimant understood that the employer expected him to accept work and refrain from long periods of being inactive for the employer. The employer discharged him because he had an inactive period, when he did not drive for the employer, from January 8 to March 3. There is no evidence to show that claimant's inability to drive from January 8 to February 19 was attributable to claimant as willful or wantonly negligent conduct because he was restricted from driving due to a work-related injury. Absences due to physical disabilities are not misconduct. OAR 471-030-0038(3)(b).

Regarding the period from February 20 to March 3, the ALJ made an implicit determination that claimant's testimony was not credible by concluding that "there is no credible evidence demonstrating that [the atrial fibrillation's] onset occurred before [claimant] left work, or if it did, [that] the condition prevented him from renewing his medical card."² We disagree with the ALJ's skepticism regarding the timing of claimant's atrial fibrillation and its effect on his medical certificate. The record shows no reason to doubt claimant's testimony regarding those matters. Although claimant did not provide documentary evidence to corroborate all his testimony, he was not required to do so, and his testimony was consistent with his conduct and the medical records he provided. *See* Exhibit 2. The ALJ also found that the employer established claimant's "sole reason" for refusing work was his preference for local work, reasoning that it was "illogical" that the employer would have continued offering claimant work had claimant told it that his medical certificate was expired.³ Claimant, however, testified that he told the operations manager about his lack of medical certificate each time the manager offered him work. Transcript at 18, 19, 23, 24. Here, we find claimant's testimony persuasive because he testified unequivocally that he told the employer, and it was logical that he would have done so. Transcript at 35. We find the operations manager's testimony less persuasive because, when asked if claimant told him about his medical condition, the manager did not respond, "no," but rather, stated, "Not that I recall," and, that he did "not remember anything of that nature." Transcript at 13, 30, 31. Even were we to give

² Hearing Decision 17-UI-90219 at 4.

³ *Id.*

both parties' testimony equal weight, we would find this fact in claimant's favor because the employer has the burden of proof in a discharge case.

We thus conclude that the preponderance of the evidence shows that claimant had an episode of atrial fibrillation on January 17 that prevented him from renewing his medical certificate, which prevented him from driving with a CDL until he was evaluated and determined to be safe to drive by his medical providers. Moreover, although claimant told the operations manager that he preferred local work, the record does not show that his preference for local work, rather than the pendency of his medical certificate, prevented claimant from working from February 20 to March 3.

We also conclude that the failure to renew the medical certificate before March 3 was not due to a willful or wantonly negligent failure to maintain a CDL. Claimant knew or should have known his medical certificate would expire on February 11. However, based on the infrequency of his episodes of atrial fibrillation, the record does not show that claimant knew or should have known to pursue an evaluation of his heart condition before the January 17 episode. *See* Exhibit 2 at 9. The record shows claimant met with his doctor two days after he experienced the atrial fibrillation, which is reasonable and not evidence of undue delay on claimant's part. That he would have to wait a month to meet with a cardiologist, and required additional testing thereafter, was also plausible and not within claimant's control. Thus, claimant was unable to renew his medical certificate due to an infrequent and unforeseen episode of atrial fibrillation and the common delays in receiving medical treatment, which are not attributable to claimant as willful or wantonly negligent conduct.

For these reasons, we conclude that the employer discharged claimant, but not for misconduct. Claimant therefore is not disqualified from the receipt of unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-90219 is set aside, as outlined above.

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

DATE of Service: September 28, 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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