

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0033

Late Application for Review Allowed
Hearing Decision 17-UI-98872 Reversed - No Disqualification

PROCEDURAL HISTORY: On September 28, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 92103). Claimant filed a timely request for hearing. On October 17, 2017, the Office of Administrative Hearings (OAH) issued notice of a hearing scheduled for October 31, 2017. On October 31, 2017, ALJ Wyatt issued Hearing Decision 17-UI-95843, dismissing claimant's hearing request for claimant's failure to appear at the hearing. On November 16, 2017, claimant filed a timely request to reopen. On November 30, 2017, OAH issued notice of a hearing scheduled for December 12, 2017. On December 12, 2017, ALJ Clink conducted a hearing at which claimant and the employer appeared, and on December 13, 2017, issued Hearing Decision 17-UI-98872, granting claimant's request to reopen and affirming administrative decision # 92103. On January 2, 2018, Hearing Decision 17-UI-98872 became final without a party having filed an application for review. On January 10, 2017, claimant filed a late application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument to EAB with his late application for review. We considered claimant's written argument in reaching this decision.

FINDINGS OF FACT: (1) JL Industries, Inc. employed claimant from July 25, 2017 to September 7, 2017 as a facility maintenance technician who performed low voltage electrical jobs for the employer.

(2) At hire, the employer provided claimant with safety training while performing duties with electrical equipment. One of the trainings was regarding the employer's "lock out, tag out" procedures for stopping the flow of electricity to a machine before working on a machine. Audio Record at 28:38-29:04. The training included a video and a written test, and a supervisor demonstrated the procedures to claimant. Claimant's position did not require him to be a licensed electrician. The employer required claimant to use the lock out, tag out procedure before he worked on a piece of equipment for safety.

(3) On August 29, 2017, claimant was not feeling well and believed his work performance suffered because he was ill. Claimant was working on a piece of equipment that used electricity and a coworker

noticed the machine was still electrified and not locked out while claimant was using it. Claimant forgot to lock out and tag out. The coworker asked claimant why he was not locked out. Claimant responded that he had forgotten to lock out. The coworker got a lock, locked out the power source to the machine, and kept the key to the lock out tag. Claimant did not notify the employee immediately when he completed his work with the machine so that the other coworker could “release the tag” so other employees had access to the machine. Audio Record at 30:41-30:52. Claimant did not know the other coworker expected him to notify him immediately after he completed his work on the machine. The coworker reported the incident to the employer.

(4) On August 30, 2017, claimant was still sick. The morning of August 30, 2017, claimant called the employer multiple times and left messages that he was sick and did not feel he could work, but he was unable to reach anyone at work. Claimant did not feel confident the employer had received the telephone messages he left that morning, so he reported to work even though he was sick. When he arrived at work, claimant was “not feeling very well, was not at [his] best” and was “very sick.” Audio Record at 49:59-50:07. Claimant told the manager on duty that day that he was sick.

(5) Later on August 30, 2017, claimant was told to wire a light switch for the employer. He turned off the light before he began working. A coworker told claimant he also needed to turn off power at the breaker, and because claimant did not know which breaker to turn off, the coworker investigated and found the correct breaker and turned it off. Claimant then began to work. The coworker told claimant he could not begin doing electrical work until he completed the lock out, tag out procedure. The coworker reported the incident to the employer.

(6) On September 6, 2017, the employer investigated the incident reports it received regarding the events on August 29 and 30, 2017.

(7) On September 7, 2017, the employer discharged claimant because he did not follow its lock out, tag out procedures on August 29 and 30, 2017.

(8) Claimant had problems with his mail, where his mail was sometimes diverted to an incorrect address or claimant did not receive his mail for unknown reasons. Claimant’s Motion to Reopen at 1, 2.

(9) On January 4, 2018, claimant called OAH to inquire about the results of the December 12, 2017 hearing because he had not yet received a copy of a decision in the mail. Claimant’s Application for Review at 3, 5, 6. Claimant learned that Hearing Decision 17-UI-98872 had been issued and requested a copy of that decision. Claimant subsequently received a copy of the decision from OAH.

CONCLUSIONS AND REASONS: Claimant’s late application for review of Hearing Decision 17-UI-98872 is allowed. Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), ALJ Clink’s findings and analysis with respect to the conclusion that claimant showed good cause for reopening the October 31, 2017 hearing are **adopted**. Hearing Decision 17-UI-98872 is modified. We disagree with the ALJ, and conclude that claimant was discharged, but not for misconduct.

Late Application for Review. An application for review is timely if it is filed within 20 days of the date that OAH mailed the decision for which review is sought. OAR 471-041-0070(1) (March 20,

2014). The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” OAR 471-041-0070(2). “Good cause” means that factors or circumstances beyond the applicant’s reasonable control prevented the applicant’s timely filing of the application for review. OAR 471-040-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b).

In written argument, claimant asserted that he did not file his application for review of Hearing Decision 17-UI-98872 within 20 days of the date the decision was mailed to him because he did not receive the copy of Hearing Decision 17-UI-98872 mailed to him on December 13, 2017. Claimant further asserted that he filed his application for review after contacting OAH about the status of the December 12, 2017 hearing, first learning that Hearing Decision 17-UI-98872 had been mailed to him, then having the decision sent to him, and receiving it. Claimant’s assertions are supported by his assertions in his Motion to Reopen the October 31, 2017 hearing and his testimony during the December 12, 2017 hearing regarding multiple problems he has had with receiving his mail in the past. Claimant’s evidence is sufficient to show that he failed to file a timely application for review because he did not receive Hearing Decision 17-UI-98872 in the mail, which likely was beyond his reasonable control. His evidence also is sufficient to show that he likely filed his application for review within a reasonable time after he received Hearing Decision 17-UI-98872 on or after January 4 when he contacted OAH about the results of the December 12 hearing. Claimant therefore established good cause to extend the filing deadline seven days to January 11, 2017, and his application for review, having been filed on January 10, 2017, is allowed.

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 discharged claimant for failing to follow its lock out, tag out procedures on August 29 and 30, 2017. In Hearing Decision 17-UI-98872, despite finding that claimant was sick on the incident dates and did not recall intentionally failing to follow the employer’s safety procedures, the ALJ concluded claimant was wantonly negligent when he failed to lock out, tag out the machine and breaker on August 29 and 30, and that his conduct was not an isolated instance of poor judgment because the conduct violated safety regulations and therefore exceeded mere poor judgment. Hearing Decision 17-UI-98872 at 4-5. We disagree.

The employer had the right to expect claimant to adhere to its safety procedures when performing electrical work. Claimant understood the employer’s lock out, tag out expectation based on training from the employer. Although the evidence is persuasive that claimant forgot to follow the lock out, tag out procedure on August 29 and 30, it is equally persuasive that his failure to do so was inadvertent and attributable to being “very sick.” Although the ALJ inferred that claimant’s conduct was wantonly

negligent, it is at least equally likely that claimant merely forgot due to being sick. Moreover, the record does not show that claimant intentionally neglected to follow the lock out, tag out procedures for any reason. Accordingly, the employer failed to meet its burden to show misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment insurance benefits on the basis of this work separation.

DECISION: Claimant's late application for review to EAB is allowed. Hearing Decision 17-UI-98872 is reversed, as outlined above.

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

DATE of Service: February 7, 2018

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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