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

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0107

Affirmed
No Disqualification

PROCEDURAL HISTORY: On December 12, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 144611). Claimant filed a timely request for hearing. On January 22, 2018, ALJ Griffin conducted a hearing, and on January 23, 2018, issued Hearing Decision 18-UI-101444, concluding the employer discharged claimant, but not for misconduct. On January 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted 128 pages of written argument to EAB that presented facts not offered into evidence during the hearing. The employer did not explain why it was unable to present this information during the hearing, or otherwise show, as required by OAR 471-041-0090 (October 29, 2006), that factors or circumstances beyond its reasonable control prevented it from doing so. Accordingly, EAB considered only information received into evidence at the hearing, and the employer's argument to the extent it was based thereon, when reaching this decision.

FINDINGS OF FACT: (1) Bean Incorporated employed claimant as a delivery driver from June 13, 2017 to November 22, 2017.

(2) The employer expected its drivers to operate its vehicles safely, in accordance with traffic laws and in a manner that would not endanger persons or property. Claimant was aware of and understood the employer's expectations.

(3) On November 7, 2017, while maneuvering his delivery truck, claimant backed into and damaged a gate belonging to a person to whom claimant was delivering a package. Claimant was backing his truck into a driveway, misjudged the location of the gate, and backed into it. Had claimant been paying better attention to his surrounding, he would not have hit the gate.

(4) On November 10, 2017, while maneuvering his delivery truck toward a residence to deliver a package, claimant drove the 10-foot high truck underneath some tree branches that were only about six

feet off the ground, causing the tree branches to break and fall off. Had claimant paid attention to his surroundings, he would not have hit and damaged the tree branches.

(5) On November 21, 2017, while maneuvering his delivery truck up a sloped unpaved driveway to deliver a package, claimant noticed the truck's tires were beginning to lose traction as the conditions were somewhat wet and muddy. Claimant decided that it would be safer to park the truck at the end of the driveway and walk the package up to the residence at the end of the driveway. Because there was not enough room for claimant to safely turn the truck around within the driveway, he shifted the truck into reverse and started to back up. While doing so, he noticed that the truck was approaching a ditch that ran along the driveway so he stopped the truck, applied the parking brake and decided to get out of the truck to get a better look at his surroundings. As he took his foot off the brake, the truck began to slide backwards toward the ditch. After one of the trucks wheels went into the ditch, he was unable to drive the truck out of the ditch. He called the employer's office for assistance and eventually the truck had to be winched out of the ditch.

(6) On November 22, 2017, the employer discharged claimant for driving the truck into the ditch on November 21, 2017.

CONCLUSION AND REASONS: We agree with the ALJ**.** The employer discharged claimant, but not for misconduct under ORS 657.176(2)(a).

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. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In its written argument, the employer objected to the ALJ's misconduct analysis and contended that it discharged claimant for "his frequency of getting the truck stuck and damaging company and customer property." Written Argument at 1. However, in a discharge case the proximate cause of the discharge is the initial focus for purposes of determining whether misconduct occurred. The "proximate cause" of a discharge is the incident without which a discharge would not have occurred and is usually the last incident of alleged misconduct preceding the discharge. *See e.g. Appeals Board Decision* 12-AB-1087, May 7, 2012 (discharge analysis focuses on proximate cause of the discharge); *Appeals Board Decision* 12-AB-0434, March 16, 2012 (discharge analysis focuses on proximate cause of the discharge, which is generally the last incident of misconduct before the discharge); *Appeals Board Decision* 09-AB-1767, June 29, 2009 (discharge analysis focuses on proximate cause of discharge, which is the incident without which the discharge would not have occurred when it did). At hearing, the employer's witness who discharged claimant testified that claimant would not have been discharged on November 22, 2017 if he had not driven an employer vehicle into a ditch on November 21, 2017. Transcript at 21.

Therefore, that incident was the proximate cause of claimant's discharge and is the proper focus of the misconduct analysis.

Claimant understood both as a matter of common sense and because he had been previously trained, that the employer expected him to operate its vehicles safely and in a manner that would not endanger persons or property. Although claimant's truck ended up in the ditch on November 21, there was no evidence that claimant's driving conduct that day was intentional and the employer failed to show that claimant was consciously indifferent to the employer's emphasis on safety in operating the vehicle as he did. On this record, there is no evidence that claimant was aware of how slippery the driveway was until he began to lose traction while ascending it, after which he immediately decided that it was safer to park the truck and walk the package up to the residence. While attempting to back the vehicle down to level ground to park it, he realized that the truck was approaching the ditch, stopped the vehicle and applied the parking brake in order to allow him to exit the vehicle and survey his surroundings. After the parking brake failed to hold and the vehicle slid toward the ditch, he eventually was able to stop the vehicle before it totally entered the ditch after which he appropriately contacted the employer and requested assistance. Although claimant may have been negligent in attempting to ascend the driveway, nothing in claimant's behavior evidenced that he was consciously aware that he probably was acting or failing to act in violation of the employer's expectation regarding safe driving. Absent such evidence, the employer failed to show that claimant engaged in misconduct on November 21, 2017.

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 his work separation.

DECISION: Hearing Decision 18-UI-101444 is affirmed.

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

DATE of Service: <u>February 23, 2018</u>

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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