EO: 200
BYE: 201842

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

408
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0113

Reversed ~ Revocada
No Disqualification ~ No Descalificación

PROCEDURAL HISTORY: On November 16, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 110743). Claimant filed a timely request for hearing. On December 28, 2017 and January 16, 2018, ALJ Frank conducted a hearing, and on January 24, 2018, issued Hearing Decision 18-UI-101630, affirming the Department's decision. On January 31, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record, and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Boise Cascade Company employed claimant as a stacker operator from November 29, 2005 to October 27, 2017.

(2) Prior to May 2017, the employer expected its plywood veneer stacker operators to turn off the veneer in-feed conveyor belt prior to resolving a veneer jam in the stacker machinery by removing the jammed veneer section with a hook pole. On or about May 9, 2017, the employer implemented a safety rule to require its stacker operators to turn off both in-feed belt and the stacker conveyor belts prior to removing any jammed veneer section with a hook pole. On May 9, 2017, the employer held a training session for its stacker operators during which the new safety rule was discussed and stacker operators told that going forward they were expected turn off both in-feed and stacker conveyor belts prior to removing any jammed veneer in the machinery with a hook pole. Claimant did not attend the training session because he was in Mexico from May 7 to May 13, 2017.

(3) Sometime on or after May 14, 2017, when claimant returned to work, claimant was asked to sign the attendance sheet for the May 9, 2017 training session, which he did. However, claimant never received training on the new rule or was told the procedure had changed.

(4) On October 23, 2017, the employer's plant manager observed claimant removing a section of jammed veneer from the stacker machinery with a hook pole while the in-feed conveyor belt was off but the stacker conveyor belts were still running. The employer suspended claimant on that date pending an investigation into the incident, which the employer considered a serious violation of its safety rule.

(5) On October 27, 2017, the employer discharged claimant for violating its safety rule on October 23, 2017. Exhibit 1 at 1.

CONCLUSIONS AND REASONS: We disagree with the ALJ. The employer discharged claimant, but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. 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).

The employer discharged claimant on October 27, 2017 because on October 23, 2017, claimant was observed "inserting a hook pole into the stacker conveyor belts while the stacker belts were running" in violation of a safety rule instituted by the employer on May 9, 2017 when it held a training session for stacker operators. Exhibit 1 at 2-3. In Hearing Decision 18-UI-101630, after finding that claimant "signed a form, acknowledging that he had been trained on the procedure" although he was out of the country on May 9, 2017, the ALJ concluded the employer discharged claimant for misconduct, reasoning,

> [Claimant] specifically asserted he had not been trained on the procedure requiring the disabling of two belts before removing stuck objects from a stacker machine. While claimant is credible that he was out of the country at the time of this training, his former supervisor testified firsthand that the training had been reviewed with claimant upon his return. Claimant also signed a document, certifying the same… It is more likely than not that claimant was well aware of the policy and procedure on October 23, 2017 and, therefore, likely violated it willfully that day by powering down only one belt before removing the wood from the stacking machine. By doing so, he willfully disregarded the employer's interest.

Hearing Decision 18-UI-101630 at 2, 4. We disagree and conclude the employer failed to meet its burden to show that claimant received training on the new safety rule prior to October 23, 2017. At hearing, the employer initially asserted that claimant received the training because he attended the training session on May 9, 2017, but after claimant asserted that he was out of the country between May 7 and May 13, 2017, the employer revised its position and asserted that claimant was trained by a supervisor after he returned. Transcript at 12, 22-24. Although the supervisor in

question testified that he did train claimant after he returned, when claimant questioned him about when the training took place, he responded that he "[did] not recall." Transcript at 28. Although claimant acknowledged that he had signed the attendance form for the May 9, 2017 training session because "possibly" "[t]hey…made me sign it after I came from vacation", he emphatically denied that he had been trained on the new procedure. Transcript at 17-19, 23-24, 29. Moreover, the supervisor in question completed an "Employee Coaching Form" to document every prior discussion with claimant concerning important matters, but did not complete the form for the safety rule training discussion in question although the form had a box that could checked off for "training issue discussion with employee." Exhibit 1 at 5-8. Viewed objectively, the parties' evidence on the issue differs and there is no reason in the record to find that one party is more credible than the other as to whether or not claimant received training. When the evidence on a disputed issue is evenly balanced, the uncertainty must be resolved in claimant's favor because the employer carries the burden of proof in a discharge case. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Accordingly, we find that the employer failed to establish by a preponderance of evidence that claimant received training on the new safety procedure prior to October 23, 2017.

On October 23, 2017, claimant removed a section of jammed veneer from the stacker machinery with a hook pole after he turned off the in-feed conveyor belt nearest to the jam but without turning off the stacker conveyor belts because that was the only procedure he had been trained to follow up to that time. Transcript at 29-30. When he was confronted about not turning off the stacker belts as well by the plant manager, claimant told him he thought he only needed to stop one belt. Transcript at 19. Although the employer established claimant was mistaken in that understanding, the employer failed to show that claimant's violation of the employer's new safety rule that day was either willful or the result of conscious indifference to the employer's expectation. Absent such showings, we conclude the employer discharged claimant, but not for misconduct under ORS 657.176(2)(a). Claimant therefore is not disqualified from receiving unemployment insurance benefits on the basis of his work separation from the employer.

DECISION: Hearing Decision 18-UI-101630 is set aside, as outlined above. *Decisión de la Audiencia 18-UI-101630 se deja a un lado, de acuerdo a lo indicado arriba.*[1]

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

DATE of Service: <u>March 7, 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

[1] 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. *Esta decisión revoca una decisión de audiencia que negaba los beneficios. Por favor tenga en cuenta que puede tomar el Departamento de varios dias a dos semanas para pagar los beneficios astrasados.*

'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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.

***NOTA**: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en **courts.oregon.gov**. En este sitio web, hay información disponible en español.*

Por favor, ayúdenos mejorar nuestros servicios por llenar el formulario de encuesta sobre nuestro servicio de atencion al cliente. *Para llenar este formulario, puede visitar* https://www.surveymonkey.com/s/5WQXNJH. *Si no puede llenar el formulario sobre el internet, puede comunicarse con nuestra oficina para una copia impresa de la encuesta.*