STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 16-01468

vs.

Referee Decision No. 0027893567-02U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of an appeal of the decision of a reemployment assistance appeals referee pursuant to Section 443.151(4)(c), Florida Statutes. The referee's decision stated that a request for review should specify any and all allegations of error with respect to the referee's decision, and that allegations of error not specifically set forth in the request for review may be considered waived.

On appeal to the Commission, evidence was submitted which had not been previously presented to the referee. The parties were advised prior to the hearing that the hearing was their only opportunity to present all of their evidence in support of their case. Florida Administrative Code Rule 73B-22.005 provides that the Commission can consider newly discovered evidence only upon a showing that it is material to the outcome of the case *and* could not have been discovered prior to the hearing by an exercise of due diligence. The Commission did not consider the additional evidence because it does not meet the requirements of the rule.

Upon appeal of an examiner's determination, a referee schedules a hearing. Parties are advised prior to the hearing that the hearing is their only opportunity to present all of their evidence in support of their case. The appeals referee has the responsibility to develop the hearing record, weigh the evidence, resolve conflicts in the evidence, and render a decision supported by competent, substantial evidence. Section 443.151(4)(b)5., Florida Statutes, provides that any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs is admissible, whether or not such evidence would be admissible in a trial in state court. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding

Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

The Commission's review is generally limited to the evidence and issues before the referee and contained in the official record. A decision of an appeals referee cannot be overturned by the Commission if the referee's material findings are supported by competent, substantial evidence and the decision comports with the legal standards established by the Florida Legislature. The Commission cannot reweigh the evidence or consider additional evidence that a party could have reasonably been expected to present to the referee during the hearing. Additionally, it is the responsibility of the appeals referee to judge the credibility of the witnesses and to resolve conflicts in evidence, including testimonial evidence. Absent extraordinary circumstances, the Commission cannot substitute its judgment and overturn a referee's conflict resolution.

The record reflects the claimant, pursuant to company policy, was made aware that he could face termination as a result of performance related to vehicle accidents. The claimant had two accidents in which he was considered at fault, although he was not cited for either accident. He received a warning after the first accident. Two months later, on June 8, 2015, the claimant had the second accident. It occurred when the claimant admittedly hit another vehicle's rear door when he changed lanes during a full left turn resulting in $1000 in damages to the other vehicle.

Section 443.036(29)(b), Florida Statutes, defines misconduct in part as follows:[1]

> Carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent, or shows an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his or her employer.

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[1] The employer's evidence revealed that it discharged the claimant for violation of a vehicle safety policy and the referee held the claimant disqualified under Section 443.036(29)(e), Florida Statutes. We have previously held, however, that where a rule violation is inadvertent or negligent, a weighing process must be applied under the defense contained in Section 443.036(29)(e)1.c., Florida Statutes, that the rule is "not fairly enforced" to disqualify. *See* R.A.A.C. Order No. 13-07369 (November 6, 2013), available at http://www.floridajobs.org/finalorders/raac_finalorders/13-07369.pdf. For purposes of this case, our analysis under the "fair enforcement" defense yields the same ultimate result as that under subparagraph (b).

In determining whether the occurrence of motor vehicle accidents constitutes misconduct under Section 443.036(29)(b), Florida Statutes, the Commission is guided by a number of court decisions as well as its own prior precedent. It is well established that accidents caused by simple negligence or by inability are not typically misconduct, even when more than one occurs. For example, in *Poole v. J.B. Hunt Transport, Inc.*, 703 So. 2d 1158 (Fla. 2d DCA 1997), the court held the claimant not disqualified where he was involved in three preventable accidents, but had not received any citations. Reviewing the facts, Judge Altenbernd noted that nothing in the record reflected that "these accidents were anything other than simple acts of misjudgment while driving," and noted that there was no evidence of any willful act. 703 So. 2d at 1159. In *Maxfield v. Unemployment Appeals Commission*, 716 So. 2d 859 (Fla. 5th DCA 1998), the claimant was held not disqualified despite experiencing three preventable accidents in a 12-month period in violation of an employer policy. Noting that none of the accidents involved personal injury, the court distinguished between the conduct at issue in *Trinh Trung Do v. Amoco Oil Co.*, 510 So. 2d 1063 (Fla. 4th DCA 1987), and that before them, noting that Trinh's "conduct of repeatedly violating the lawful speed limits was volitional and inherently dangerous, clearly exceeding mere acts of misjudgment." *Id*. at 861. In *Lyster v. Unemployment Appeals Commission*, 826 So. 2d 482 (Fla. 1st DCA 2002), the claimant was involved in five accidents in a year, resulting in his discharge. None of the accidents, which involved low-speed maneuvers like backing and turning, resulted in citations. The court concluded these facts involved no more than simple negligence, and were a result of inability rather than misconduct.

By contrast, in *Trinh Trung Do*, the driver was involved in several accidents, not all of which were his fault, but despite being warned after those accidents, was noted on several occasions to be speeding and eventually rear-ended another vehicle because he was following too closely in heavy traffic. In *Girgis v. Unemployment Appeals Commission*, 897 So. 2d 513 (Fla. 4th DCA 2005), the driver not only had two accidents, but in the second one hit a stationary post while turning to avoid a vehicle on the other side, admitting that he had not been looking to the side where the post was. In both of these cases, the courts held the claimants disqualified, with the *Girgis* court concluding that "driving without looking where you are going" was sufficient in those circumstances to establish misconduct. 897 So. 2d at 515.

Thus, in analyzing subparagraph (b) cases under this precedent, the Commission examines the claimant's conduct to determine whether, as in *Trinh Trung Do* and *Girgis*, and unlike *Poole*, *Maxfield*, and *Lyster*, the claimant without justification intentionally engaged in an act (or failure to act) that he knew or should have known significantly increased the risk of an accident. While an intentional choice to drive in a riskier fashion does not equate to intent to have an accident, it is more than a simple misjudgment while otherwise driving safely, or a simple case of being unable to exert the physical control necessary, often in a split second, to prevent a collision that more capable drivers might have avoided.

In this case the record is clear that the claimant's second accident was caused by intentionally changing lanes during a left turn. While the claimant checked his mirror before the start of the turn and did not see anyone in the lane he intended to change into, the possibility of a passenger vehicle overtaking his delivery vehicle during a turn remained obvious. The claimant's unsafe lane change was a violation of Section 316.085(2), Florida Statutes. Moreover, it ignored the common driving safety principle that lane changes should not be made in an intersection. The claimant's choice, without any apparent necessity, significantly increased the risk of an accident. It thus constitutes the kind of intentional act required for misconduct under subparagraph (b).

This choice was also not consistent with the employer's policy requirement that a driver use "defensive driving techniques." Under the weighing process of the fair enforcement defense, the degree of the claimant's culpability is higher than a typical accident and is not offset by any mitigating factor.

As a result, we conclude that whether analyzed under subparagraph (b) or (e), the referee's decision is supported by competent, substantial evidence and the ultimate conclusion is legally correct.

The referee's decision is affirmed. The claimant is disqualified from receipt of benefits. The employer's account is relieved of charges in connection with this claim.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on

9/29/2016 ,

the above Order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Ross
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*51341178 *

Docket No.0027 8935 67-02 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellee ***EMPLOYER/Appellant***

APPEARANCES Employer

Claimant

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

Issues Involved:

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

Findings of Fact: The claimant worked as a delivery driver for an auto parts retailer from October 1, 2014, through June 8, 2015. On April 2, 2015, the claimant reversed the company vehicle into another vehicle. Later that day, the owner issued a verbal warning to the claimant for an at fault accident. The claimant was made aware of the employer's requirement that an employee be terminated for performance issues, which include vehicle accidents. On June 8, 2015, the claimant lane changed while making a left turn, and struck another vehicle's rear door. The responding officer on site of the accident determined that the claimant was at fault for the accident. Later that day, the owner discharged the claimant for violation of the employer's policy related to a vehicle accident.

Conclusions of Law: The Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

(a) Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

(b) Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

(c) Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

(d) A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

(e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The record reflects that the claimant was discharged. The burden of proof is upon the employer to prove that the claimant

was discharged for misconduct.

The employer presented competent testimony regarding the claimant being previously warned for an at-fault vehicle accident, and being involved in another at fault accident following warning. It was also shown that the claimant was made aware that involvement in vehicle accidents was grounds for termination according to the employer's policy. As such, the claimant's actions are considered disqualifying under subsection (e) due to his violation of a known rule of the employer. Therefore, the claimant is subject to disqualification.

Decision: The determination dated March 21, 2016, is REVERSED. The claimant is disqualified from the receipt of benefits for the week ending June 13, 2015, plus five weeks and until the claimant earns $3,383. The employer's account will not be charged for any benefits paid on this claim.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed/mailed to the last known address of each interested party on April 14, 2016.

S. NELSON
Appeals Referee

By:

MONTY CROCKETT, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and the last five digits of the claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived. There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y los últimos cinco dígitos del número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados. No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak senk dènye chif nimewo sekirite sosyal demandè a sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante. Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.
