STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Order No. 13-04616

vs.

Referee Decision No. 13-34173U

Employer/Appellee

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission for disposition of the claimant's appeal pursuant to Section 443.151(4)(c), Florida Statutes, of a referee's decision wherein the claimant was held disqualified from receipt of benefits and the employer's account was noncharged.

Pursuant to the appeal filed in this case, the Reemployment Assistance Appeals Commission has conducted a complete review of the evidentiary hearing record and decision of the appeals referee. *See* §443.151(4)(c), Fla. Stat. By law, the Commission's review is limited to those matters that were presented to the referee and are contained in the official record.

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1), Florida Statutes.

The referee made the following findings of fact:

> The claimant worked as a driver for a garbage and recycling company from July 2010 to March 4, 2013. The employer has a safety incident policy in which points are assessed for violations. A preventable accident is assessed at four points. If an associate reaches 12 [points, he/she is] discharged. The claimant signed an acknowledgement of the policy. The drivers are also responsible for inspecting their vehicle and reporting any damage to the vehicle. In June [2012,] the claimant was assessed four points when he had damage to his [bumper] and failed to report it. In February [2013,] the claimant did $41,000 damage to a parking garage and received four points. The claimant was given a final

> written warning and suspended for three days. The claimant was advised [that,] if he incurred further safety violation [points,] he would be discharged. The claimant was driving with a flat tire and hit a gate. The claimant was discharged by the operations supervisor for violation of company policy.

Based on these findings, the referee held the claimant was discharged for misconduct connected with work, concluding that "the record shows that the claimant was fired for violation of the employer safety and incident policy." She further concluded that "the record is devoid of any competent or substantial testimony to demonstrate that the policy was unlawful, unreasonable and not fairly or consistently enforced. The actions of the claimant are a violation of the policy and are misconduct under the law." Upon review of the record and the order on appeal, the Commission concludes that, while the referee's limited factual findings, as written, are supported by the record, the referee failed to make the fundamental factual findings necessary to establish misconduct under the employer's policy, and by failing to do so erroneously concluded that the employer had established misconduct by violation of the employer's policy. Normally, the Commission would remand the case to the referee to permit the referee to make additional findings and revisit her conclusions. Our review of the record, however, establishes that the record evidence, taken in the light most favorable to the employer, and giving full credence to the employer's witnesses as the referee did, is insufficient as a matter of law to prove misconduct; accordingly, the order is reversed.

Section 443.036(30), Florida Statutes, states that misconduct connected with work, "irrespective of whether the misconduct occurs at the workplace or during working hours, includes, but is not limited to, the following, which may not be construed in pari materia with each other":

> (a) Conduct demonstrating a 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.
>
> (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 interests 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) A violation of an employer's rule, unless the claimant can demonstrate that:
>
> 1. He or she did not know, and could not reasonably know, of the rule's requirements;
> 2. The rule is not lawful or not reasonably related to the job environment and performance; or
> 3. The rule is not fairly or consistently enforced.

The claimant in this case was discharged for violating the employer's "Safety and Incident Policy" by being assessed four points each for three separate incidents, for a total of 12 points. As the referee found, and the claimant's write-ups show, these incidents occurred on June 1, 2012, February 4, 2013, and March 1, 2013.[1] The employer submitted a copy of the "Safety and Incident Policy" for the hearing and it was entered into evidence as an exhibit.[2]

The policy states, in relevant part, that four points will be assessed for a "preventable accident/incident," and the accrual of 12 points within a 12-month period will result in termination. The policy lists no other violations for which exactly four points may be awarded. The policy does list "failure to immediately report an accident/incident" as a violation. The stated sanction for that offense, however, is twelve points, i.e., immediate dismissal.

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[1] The documentary evidence reflects that claimant was at one time assessed six points for speeding on March 4, 2012, and that incident was listed on his termination notice. The testimony of both of employer's witnesses, however, reflect that because of questions as to the validity of the ticket, and its absence on a motor vehicle report regarding claimant's license, it was not considered in the final decision to terminate claimant.

[2] The policy document introduced was dated January 1, 2013. The employer did not specifically state that the policy was identical in 2012, when the first incident occurred, but the employer's documents included an acknowledgement of the claimant's receipt of the Code of Conduct in March 2011, and the employer's operations supervisor testified that the policy document in evidence was the policy claimant violated. For the purposes of this order, the Commission will assume, as the referee did, that the 2012 policy document was functionally identical.

In a discharge case, the employer bears the burden of proof to establish misconduct by a preponderance of the evidence. *See*, *generally*, *Lewis v. Unemployment Appeals Commission*, 498 So. 2d 608 (Fla. 5th DCA 1986). In a case under subparagraph (e), the Commission has held that the employer bears the initial burden of proving that the employee violated its policy, and that the employer terminated the employee as provided by the policy. *See* R.A.A.C. Order No. 12-07706 (August 20, 2012). In order to establish that the claimant is subject to disqualification for misconduct by violation of the point-system policy, the employer herein must present competent, substantial evidence to establish that the claimant committed *each violation for which points were assigned*. This is consistent both with the statute, and with the testimony of claimant's supervisor, the employer's commercial route manager, that the claimant would *not* have been discharged had he not accrued 12 points in a 12-month period.

The record reflects the claimant received four points for "damage to the bumper" on June 7, 2012. The counseling and warning document in evidence states, "On [June 1, 2012,] there was damage noticed on the bumper of your truck. The damage was not called in or reported by you." The documentary evidence, the employer's route manager's testimony, and that of the operations supervisor, indicate the claimant received four points not for a preventable accident, but because damage was noticed on his truck that he did not report. The route manager admitted that he was on vacation at the time, that no customers complained, but that "there is damage to his vehicle and he is responsible for his vehicle."[3]

Even if we were to allow the employer at this time to recharacterize the June 2012 violation from "failure to report" to a "preventable accident," the Commission concludes there is insufficient evidence to meet the burden of proof. Both the referee and Commission have given significant leeway to the employer in proving the rule violations. There were no witnesses who testified live at the hearing other than claimant who witnessed any of the incidents, and while claimant acknowledged that there were accidents in February and March 2013, the employer's conclusion that these were *preventable* was based on investigations that either relied on hearsay from third party witnesses, or inferred fault from the nature of the accident itself. While we conclude the referee's findings of the claimant's fault as to the February and March 2013 incidents are thus supported by competent, substantial evidence, we find insufficient evidence that claimant had a "preventable accident" in June 2012. The employer introduced no evidence of any kind regarding the cause or source of the damage, or that it was caused by an accident preventable by the

[3] The write-up given to claimant by the employer comes much closer to establishing a violation of the "failure to immediately report an accident/incident" rule violation, which would have resulted in an immediate dismissal. The employer chose not to interpret these facts as a violation of that rule either at the time of the incident, or at the hearing in this case. The Commission will not do so now.

claimant. Indeed, the route manager's testimony regarding what constituted a "preventable accident" implied that it required an accident which, after investigation, was shown to be the fault of the driver. Furthermore, unlike the other two incidents, the claimant did not admit to having an accident which caused this damage.

Given the employer's own characterization of this incident, and the fact that, under its own policy, four points could *only* be awarded for a preventable accident, the Commission concludes that the employer failed to carry its burden of proof as to violation of its policy sufficient to establish misconduct.

While the referee did not also consider whether the factual findings supported a determination as to misconduct under subparagraph (b), the Commission has done so. The facts demonstrate the claimant was responsible for two accidents from which the record supports an inference of negligence on his part. We conclude, however, that these facts are insufficient to establish "carelessness or negligence to a degree or recurrence that manifests culpability or wrongful intent." Claimant's employer acknowledged that it would not have fired him for having only the eight points awarded for these two incidents, and that its policy disregards incidents occurring more than 12 months previous. Since misconduct serious enough to warrant discharge of an employee is not necessarily serious enough to warrant a denial of unemployment compensation benefits, *Borland v. Unemployment Appeals Commission*, 910 So. 2d 320 (Fla. 2d DCA 2005), the Commission concludes that two incidents that are not even sufficient to terminate the claimant are not sufficient to disqualify him under subparagraph (b).

The referee's conclusion that the record evidence and findings established a violation of subparagraph (e) is not in accordance with the law, and is therefore rejected. Under the circumstances, the Commission concludes the record lacks competent evidence to show the claimant's discharge was for misconduct connected with work; consequently, he is not disqualified the receipt of benefits.

The decision of the appeals referee is reversed. If otherwise eligible, the claimant is entitled to benefits. The employer's record shall be charged with its proportionate share of benefits paid 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 8/5/2013, 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 Thomas
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
MSC 350WD CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

IMPORTANT:	For free translation assistance, you may call 1-800-204-2418. Please do not delay, as there is a limited time to appeal.
IMPORTANTE:	Para recibir ayuda gratuita con traducciones, puede llamar al 1-800-204-2418. Por favor hágalo lo antes posible, ya que el tiempo para apelar es limitado.
ENPÒTAN:	Pou yon intèpret asisté ou gratis, nou gendwa rélé 1-800-204-2418. Sil vou plè pa pràn àmpil tàn, paské tàn limité pou ou ranpli apèl la.

Docket No. **2013-34173U** Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant **EMPLOYER/Appellee**

APPEARANCES: CLAIMANT & EMPLOYER LOCAL OFFICE #: 3631-0

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); 443.036(30), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

CHARGES TO EMPLOYMENT RECORD: Whether benefit payments made to the claimant shall 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 employer 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 driver for a garbage and recycling company from July 2010 to March 4, 2013. The employer has a safety incident policy in which points are assessed for violations. A preventable accident is assessed at four points. If an associate reaches twelve points they are discharged. The claimant signed an acknowledgement of the policy. The drivers are also responsible for inspecting their vehicle and reporting any damage to the vehicle. In June

2012 the claimant was assessed four points when he had damage to his dumper and failed to report it. In February 2013 the claimant did $41,000 damage to a parking garage and received four points. The claimant was given a final written warning and suspended for three days. The claimant was advised that if he incurred further safety violation points that he would be discharged. The claimant was driving with a flat tire and hit a gate. The claimant was discharged by the operations supervisor for violation of company policy.

Conclusions of Law: As of June 27, 2011, 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.

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

1. He or she did not know, and could not reasonably know, of the rules requirements;
2. The rule is not lawful or not reasonably related to the job environment and performance; or
3. The rule is not fairly or consistently enforced.

The record shows the claimant was discharged for violation of the employer safety and incident policy. The record further shows the claimant signed an acknowledgement of the policy and was advised if he received another safety violation he would be discharged. The record further shows the claimant accumulated 12 points. The record is devoid of any competent or substantial testimony to demonstrate that the policy was unlawful, unreasonable and not fairly or consistently enforced. The actions of the claimant are a violation of the policy and are misconduct under the law.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the

employer to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the employer.

Decision: The determination dated April 17, 2013, is AFFIRMED. The claimant is disqualified from receiving benefits from March 3, 2013, plus five weeks and until the claimant earns $4,675. The account record of the employer (0154575) shall be non-charged.

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 mailed to the last known address of each interested party on May 14, 2013.

PEGGY LEIGHT
Appeals Referee

By: _____
DREXELL CARTER, 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 mailing 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 below 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 https://iap.floridajobs.org/ or by writing to the address at the top of this decision. The date the confirmation number is generated will be the filing date of a request for reopening on the Appeals 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 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.

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 fecha 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 https://iap.floridajobs.org/ o escribiendo a la dirección en la parte superior de esta decisión. La fecha en que se genera el número de confirmación será la fecha de registro de una solicitud de reapertura realizada en el Sitio Web de la Oficina de Apelaciones.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Desempleo; 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 el 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.

ENPÒTAN – DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat nou poste sa a ba ou. Si 20^{yèm} 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, https://iap.floridajobs.org/ oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat yo pwodui nimewo konfimasyon an se va dat yo prezante demann nan pou reouvri kòz la sou Sitwèb Apèl la.

Yon pati ki te asiste seyans la epi ki pat satisfè desizyon yo te pran an gen dwa mande yon revizyon nan men Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org/.** Si ou voye l pa lapòs, dat ki sou tenb la ap dat ou depoze apèl la. Si ou depoze apèl la sou yon sitwèb, ou fakse li, bay li men nan lamen, oswa voye li pa yon sèvis mesajri ki pa Sèvis Lapòs Lèzetazini (*United States Postal Service*), oswa voye li pa Entènèt, dat ki sou resi a se va dat depo a. Pou evite reta, mete nimewo rejis la (*docket number*) avèk nimewo sekirite sosyal moun k ap fè demann lan. Yon pati k ap mande revizyon dwe presize nenpòt ki alegasyon erè nan kad desizyon abit la, epi bay baz reyèl oubyen legal pou apiye alegasyon sa yo. Yo p ap pran an konsiderasyon alegasyon erè ki pa byen presize nan demann pou revizyon an.