

FILED: March 14, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

EXPEDITE DELIVERY SERVICE, INC.,
Petitioner,

v.

EMPLOYMENT DEPARTMENT,
Respondent.

Employment Appeals Board
10AB1939

A146382

Argued and submitted on December 12, 2011.

Geordie Duckler argued the cause and filed the brief for petitioner.

Karla H. Ferrall, Assistant Attorney General, argued the cause for respondent. With her on the brief were John R. Kroger, Attorney General, and Mary H. Williams, Solicitor General.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

PER CURIAM

Reversed and remanded.

1 PER CURIAM

2 Petitioner, Expedite Delivery Service, Inc., seeks judicial review of an
3 Employment Appeals Board (EAB) order affirming the administrative law judge's (ALJ)
4 decision that claimant, who provided delivery driver services for petitioner, was not an
5 independent contractor as the term is defined in ORS 657.040, and that claimant was not
6 discharged for misconduct, ORS 657.176(2)(a). On review, petitioner assigns error to
7 EAB's conclusion that claimant was petitioner's employee. We reverse and remand.

8 Claimant was discharged because he was late for work. The Employment
9 Department determined that claimant had a valid claim for unemployment insurance
10 benefits. Petitioner filed a request for hearing before an ALJ, arguing initially that
11 claimant was not entitled to benefits because he was an independent contractor and,
12 secondly, that he had been discharged for misconduct. After conducting a hearing, the
13 ALJ issued a final order concluding that claimant was petitioner's employee and was
14 discharged, but not for misconduct. Petitioner appealed to the EAB, and the EAB
15 affirmed the ALJ's order.

16 On review, petitioner contends that the EAB's order is not supported by
17 substantial evidence in the record. We agree.

18 In [*Register Guard v. Employment Dept.*](#), 247 Or App 692, __ P3d __
19 (2012), we recently held that the EAB's order assuming that the claimant was an
20 employee and not an independent contractor without stating factual findings supporting
21 that conclusion lacked substantial evidence and substantial reason. *Id.* at 696. In that
22 case, the EAB order affirmed the ALJ's order that the claimant was the petitioner's

1 employee and was discharged, but not for misconduct. In affirming the ALJ's order, the
2 EAB assumed, without deciding, that the claimant was an employee and not an
3 independent contractor: "For purposes of addressing [petitioner's] argument that claimant
4 was discharged for misconduct, we assume without deciding that claimant provided
5 services to [petitioner] as an employee." *Id.* at 695. Here, the EAB order provided an
6 identical conclusion: "For purposes of addressing [petitioner's] assertion [that claimant
7 was discharged for misconduct], we assume without deciding that claimant provided
8 services to [petitioner] as an employee." The order provided no other facts to support the
9 EAB's assumption that claimant was an employee. Thus, the EAB's order concerning
10 claimant's status as an employee lacks substantial evidence and substantial reason.

11 Reversed and remanded.