

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
OFFICE OF WORKER'S COMPENSATION HEARINGS
P.O. BOX 7922
MADISON, WISCONSIN 53707-7922
(608) 266-1340

2012-029881

PAUL D PETERSON

Applicant,

vs.

PLEASE SEE ENCLOSURE

WAL-MART ASSOCIATES INC
115 DISTRIBUTION WAY
BEAVER DAM WI 53916-8809

Respondent,

ILLINOIS NATIONAL INS CO
C/O CLAIMS MANAGEMENT INC
PO BOX 14731
LEXINGTON KY 40512-4731

Insurance Carrier.

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Hearings were held in Madison, Wisconsin, on August 13, 2015 and February 1, 2016.

APPEARANCES: Applicant, in person, and by Attorney Aaron N. Halstead; Respondents, by Attorney Brian W. Baird.

The respondent conceded jurisdictional facts, an average weekly wage of \$1,480.77, and that the applicant sustained a compensable injury on November 10, 2012.

The only issue in dispute at these hearings was whether the respondent was liable for payment of increased compensation for an unreasonable refusal to rehire.

Upon that issue, the administrative law judge makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The applicant, Paul D. Peterson, was born on September 4, 1961. He began his full-time semi-tractor trailer, over-the-road truck-driving work at respondent Walmart Associates, Inc., on October 27, 2003. His last day of work was November 15, 2013.

The applicant sustained a conceded compensable traumatic left thumb injury on November 10, 2012, when he tripped over a concrete parking stop and fell in the respondent's truck lot. (Applicant's Exhibits A-C) He was off work for 324 days, returned to driving soon after passing his October 29, 2013 CDL medical examination (Applicant's Exhibit F), and experienced problems on November 7, 2013 which resulted in his termination.

The respondent had the burden of proof to demonstrate the applicant's dismissal was reasonable – made difficult given his consistently good annual performance reviews (Applicant's Exhibit D) and numerous awards (Applicant's Exhibits P and Q) during his 10-year career. It had the opportunity to offer a copy of a governing disciplinary policy, as well as the requested written evidence of any practices, procedures, and policies concerning relevant NaviGo (in-truck GPS) system use, refueling, and excess or out-of-route mileage (Applicant's Exhibit S); but, it failed to present anything other than home-break and travel expense rules. Instead, it offered post-termination written narratives and manager testimony designed to explain and justify its action.

The respondent did not meet its burden. By reasonable inference, I conclude it had a driving- and nondriving-offense disciplinary procedure which allowed for notices of "occurrences" and "steps" for misconduct. Driving offenses would "fall off" after 12 months of active work, while nondriving offenses would be removed from the record after passage of 6 months. It involved a 4-step progression toward discharge, with four 1 step, two 2-step, two 3-step, or a 4-step on-record violation sufficient for it. The applicant may or may not have had pre-termination nondriving occurrences or even 1-step or 2-step penalties; however, all but one had fallen off by the time of his November 2013 problems. (Applicant's Exhibit T)

The applicant received a 2-step notice of a nondriving offense for insubordination relating to NaviGo non-use on October 3, 2012, made retroactive to July 17, 2012—which he unsuccessfully informally contested (Respondent's Exhibit 7). Nevertheless, with his post-accident lost time, it would have fallen off on February 21, 2014. (Applicant's Exhibit T) A non-step occurrence was imposed for his asserted unsafe work practice resulting in his trip and fall on November 10, 2012, and that was set to be removed on March 30, 2014. (Applicant's Exhibits D and T) Thus, he would have needed another two 1-steps, a 2-step, a 3-step, or a 4-step penalty before his employment could have ended involuntarily in November 2013.

There were three written contemporaneous explanations for the applicant's discharge, none of which were shared with him before he was escorted from the respondent's premises on November 15, 2013 or for at least a week thereafter:

- An Exit Interview dated November 15, 2013 (Applicant's Exhibit M), which gave "insubordination" as a reason for the termination, based upon his alleged failure to follow NaviGo directions and incur 20 excess or out-of-route miles.
- An UI Claim Investigation – Employer Statement dated December 23, 2013 (Applicant's Exhibit N) that repeated the insubordination charge and bases therefor.
- A statement by the General Transportation and Human Resources managers dated November 15, 2013 (Respondent's Exhibit 8), which referred to violations of the break rule and out-of-route mileage but not NaviGo use. It also cited consideration of the July 17, 2012, 2-step penalty "for the same reason"; however, that involved only a supervisor's purported specific order to follow NaviGo and noncompliance with it.

Of the three bases mentioned, NaviGo use, out-of-route miles, and personal break rules, only the latter was addressed by a written respondent policy or demonstrated practice. The NaviGo system was only an available tool for drivers; its use was not imperative. (Applicant's Exhibits G and I) The respondent merely had an off-route mileage goal (here, 3% maximum a day) to reduce overall expenses. (Applicant's Exhibit J); off-route travel itself was not prohibited. At-home breaks required advance respondent permission (Respondent's Exhibit 9).

Given this and the lack of any specific respondent instruction to the applicant mandating the use of the NaviGo system or prohibiting out-of-route miles during his November 7, 2013 trip, he violated only the home-break rule in failing to receive advance permission to take it. The other purported reasons for discharge noted in the Exit Interview, UI statement, and manager statement were baseless, as was the comparison to the July 17, 2012, 2-step penalty which clearly involved a disputed violation of a supervisor's specific order. Therefore, I cannot reasonably infer that at least a second 2-step penalty should have been or was imposed on November 15, 2013, especially since the two supervisors in attendance at the discharge meeting were unaware of his home break until he disclosed it during their meeting. (Applicant's Exhibit L) While his tractor and reefer were being fuelled and fully inspected by mechanics at the respondent distribution center, he used his personal vehicle to travel three to four miles home for a quick shower and change of uniform. He subsequently, as usual, made timely deliveries and returned to the home center without refueling at a higher cost at a commercial establishment. (Applicant's Exhibit R)

Over-the-road truck-driving and transportation management are demanding occupations, made even more taxing when labor or management fail to follow the rules. I find the respondent *unreasonably* refused to rehire the applicant, warranting a penalty of one year's wages, \$77,000.04, since he has been employed for no more than a week following his termination and earned less than \$500.00 for it.

The applicant approved a 20% attorney's fee.

NOW, THEREFORE, this:

ORDER

Within twenty-one days from date, the respondent Walmart Associates, Inc., shall pay to the applicant, Paul D. Peterson, the sum of Sixty-one thousand six hundred dollars and three cents (\$61,600.03), and to the applicant's attorney, Aaron L. Halstead, the sum of Fifteen thousand four hundred dollars and one cent (\$15,400.01) as fees.

This order is limited to an unreasonable refusal to rehire claim.

Dated and mailed at Madison, Wisconsin
this 16th day of February, 2016.



Roberta Arnold, Administrative Law Judge

PetersonDPaulRAeghDO

cc:

ATTORNEY AARON N HALSTEAD
C/O HAWKS QUINDEL SC
222 W WASHINGTON AVE # 450
PO BOX 2155
MADISON WI 53701-2155

ATTORNEY BRIAN W BAIRD
C/O BORGELT POWELL PETERSON
131 W WILSON ST # 600
MADISON WI 53703