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BYE: 201507

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

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0982

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 25, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 152920). Claimant filed a timely request for hearing. On May 22, 2014, ALJ Micheletti conducted a hearing and issued Hearing Decision 14-UI-18244, concluding claimant's discharge was not for a disqualifying act. On June 6, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the parties' written arguments to the extent they were based on the hearing record.

FINDINGS OF FACT: (1) Roseburg Forest Products Co. employed claimant as a jitney driver from May 4, 2012 to February 24, 2014.

(2) The employer had a policy that prohibited the use, possession or effects of drugs and alcohol in the workplace, the corresponding detailed provisions of which were contained in a collective bargaining agreement, called the "working agreement," between the employer and claimant's labor union. The employer and the labor union published the policies and corresponding provisions, and provided them to claimant in writing.

(3) The working agreement provided for drug and alcohol testing for specified reasons, including random testing and testing for cause. The for cause testing provisions provided for testing under the following circumstances:

- An employee whose behavioral conduct indicates that he/she is not in a physical condition that would permit the employee to perform a job safely and efficiently will be subject to submitting to a . . . test to determine the presence of alcohol or drugs in the body.
  a. A supervisor must have reasonable grounds to believe that the employee is under the influence of or impaired by alcohol or drugs. Reasonable grounds include abnormal

coordination, appearance, behavior, speech or odor. It can also include work performance and attendance problems.

* * *

- Employees who are directly or indirectly involved in an industrial injury which requires medical care are subject to submitting to a . . . test * * *

- Any incident on company premises or while on company business, where there is reasonable cause to believe that alcohol or drugs contributed to the incident, will require testing for alcohol or drugs.

See Exhibit 1 at 9, 10, 13. Neither the employer's policy nor the working agreement had any policy provision specifically providing for post-accident testing, but the employer considered the policy allowing for testing in the event of industrial injury which requires medical care to cover post-accident testing. Transcript at 5, 7. The working agreement provided that an employee who provided an adulterated sample for a drug test was considered to have tested positive, and was subject to discharge.

(4) On February 20, 2014, claimant was assigned to use his forklift to move a load of veneer bundles from a tall stack of bundles. As claimant approached the stack, he noticed that the stack was leaning precariously. Claimant, who had 15 years of experience using a forklift and dealing with similar situations, approached the stack intending to use the forks of his forklift to reposition some of the veneer bundles and straighten the stack so he could proceed to move the bundles he needed to move. Claimant's previous attempts to straighten other stacks of items in the same manner had always been successful. Claimant approached the stack, and the moment the tips of the forks on his forklift touched the stack, the stack fell through a wall, causing damage to the employer's facility.

(5) Claimant immediately reported the incident to his supervisor. The supervisor told claimant that, had claimant consulted with the supervisor prior to approaching the stack of veneer bundles, the supervisor probably would have instructed claimant to do exactly as he had done. The supervisor then returned claimant to work.

(6) Later the same day, the employer decided to send claimant for a drug test due to the extent of the damage caused when the veneer bundle stack fell. Claimant complied with the instruction to test, provided a urine sample, and the lab that performed an initial amino acid test notified the employer that the sample did not appear to contain human urine. Claimant had the sample re-tested by a different lab, which also reported that claimant's sample did not contain human urine.

(7) On February 24, 2014, the employer discharged claimant for submitting an adulterated urine sample for drug testing.

CONCLUSIONS AND REASONS: The employer discharged claimant, but not for committing a disqualifying act.

ORS 657.176(2)(h) requires disqualification from benefits if an individual was discharged for committing a disqualifying act. ORS 657.176(9)(a)(C) provides that subverting, or attempting to

subvert a drug testing process required by an employer's reasonable written policy is considered a disqualifying act.

OAR 471-030-0125(3) and (6) define a "reasonable written policy," in pertinent part, as one that prohibits the use, sale, possession, or effects of drugs or alcohol in the workplace, is published and communicated to the individual or provided to him in writing, does not require the individual to pay for the test, is followed by the employer, and, when the policy provides for testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(4)(a) defines probable cause to mean that the employer has, prior to the time of the test, observable, objective evidence that gives the employer a reasonable basis to suspect that the employee may be impaired or affected by drugs or alcohol in the workplace.

The record contains evidence showing that it was more likely than not that claimant's February 20th urine sample was adulterated. Two separate labs testing the sample, including one found and paid for by claimant, concluded that claimant's sample did not contain human urine.[1] There is no dispute in this case that the employer, through a collective bargaining agreement with a labor union, had a policy that prohibited employees from subverting drug tests, or attempting to do so. Likewise, there is no dispute that the policy in question was written, prohibited the use, possession or effects of drugs in the workplace, was published and/or communicated to claimant, did not require claimant to pay for his own drug test, and provided for testing based on objective, observable evidence.

The only issue in dispute in this case is whether the employer followed its own policy when it required claimant to submit to post-accident drug testing due to the February 20th incident. The employer did not have any policy requiring its employees to submit to post-accident drug testing. Transcript at 7. Likewise, the labor agreement between the employer and claimant's labor union did not contain any such provisions. *See* Exhibit 1. The employer argued that its policy nevertheless allowed for post-accident testing because the employer classified post-accident testing the same way it classified testing for employees involved in industrial injury incidents requiring medical care. However, claimant was not involved in an industrial injury accident, nor did he or anyone require medical care because of it. When the employer tested claimant for reasons not written in its policy, and, therefore, not published or communicated to claimant in writing, or justified subjecting claimant to testing under provisions that clearly did not apply to his circumstances, the employer did not follow its own policy with respect to testing claimant. Therefore, to any extent the employer tested claimant under the industrial injury requiring medical care provision of its testing policy, the employer's policy was not reasonable, and claimant's subversion of that test cannot be considered a disqualifying act.

The employer also claimed that it had cause to test claimant under its "reasonable grounds" testing provisions because of the incident on February 20th in which claimant knocked over a leaning stack of veneer bundles, causing damage to the employer's property. The employer's "reasonable grounds" provisions provide for testing only fossertedr work performance problems or where there is an incident "where there is reasonable cause to believe that . . . drugs contributed to the incident." Therefore, the issue is whether claimant's conduct in toppling a leaning stack of veneer bundles on February 20th

[1] Claimant asserted that he did not subvert the drug test. Because of our conclusion in this case, however, we need not and do whether claimant was responsible for adulterating his urine sample.

constituted a "work performance problem," or provided "reasonable cause" to believe that drugs contributed to his conduct.[2]

Claimant attempted to adjust the leaning stack of veneer bundles based on his 15 years of experience operating a forklift and had successfully completed the same maneuver every time he had attempted it. Transcript at 22. After the incident, he immediately spoke with his supervisor, who indicated he would likely have directed claimant to do the same thing, the same way, had claimant consulted him before attempting to adjust the stack. Transcript at 23. Objectively considered, the incident did not constitute a "work performance problem." Moreover, there is no evidence suggesting that when claimant spoke to the supervisor the supervisor observed common signs of intoxication or drug use such as those listed in the employer's "reasonable grounds" testing provisions. Claimant's supervisor told him that he was being tested due to the extent of the damage, not because of signs of impairment. Transcript at 24. Therefore, the remaining "reasonable grounds" testing provisions do not apply, either.

The employer did not show that it had cause under its policy to require claimant to submit to a drug test on February 20th, and therefore, we conclude that the employer did not follow its own policy. Because the employer did not follow its own policy with respect to testing claimant, claimant was not tested under a "reasonable written policy" as required, and claimant's adulterated sample did not constitute a disqualifying act. He is, therefore, not disqualified from receiving benefits because of his work separation.

DECISION: Hearing Decision 14-UI-18244 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: <u>July 11, 2014</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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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[2] The employer also claimed that claimant's history of absenteeism and performance issues were a factor in deciding whether to test claimant on February 20, 2014. However, claimant's most recent incident of absenteeism occurred almost three months earlier, and the performance issues dated back to September 2012, well over a year prior to the final incident. Those issues were so remote in time that they cannot reasonably be considered to have indicated that to the employer that, prior to the time of the February 20th test, claimant was under the influence of drugs.