

## EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1779

*Affirmed*  
*Disqualification*

**PROCEDURAL HISTORY:** On September 12, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 71924). Claimant filed a timely request for hearing. On October 28, 2014, ALJ Murdock conducted a hearing, and on October 31, 2014 issued Hearing Decision 14-UI-27956, affirming the Department's decision. On November 17, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant's representative failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the control of claimant or his representative prevented him from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). Even if we had considered claimant's written argument, however, we would reach the same result.

In Hearing Decision 14-UI-27956, the ALJ concluded that claimant was disqualified from the receipt of unemployment insurance benefits under the Department drug and alcohol policy. The ALJ found that the disqualifying act occurred when claimant tested positive for alcohol on August 24, 2014 in violation of the employer's reasonable drug and alcohol policy. In his argument, claimant's representative asserts that the test administered by the employer on August 24 was unlawful because: the test was not administered by a "special category laboratory" as required by OAR 333-024-0365(7), and the results of the initial test made by the employer were not submitted to a licensed clinical laboratory for a confirmatory test as required by ORS 438.435(7). We disagree.

The employer tested claimant for the presence of alcohol using a saliva strip test. The statutes and rules cited by claimant's representative apply to a drug and alcohol testing of a "specimen," which is defined as "bodily fluids obtained from a live person." OAR 333-024-0305(20). Confirmatory testing of a "specimen" is required if a person tests positive for drugs or alcohol. ORS 438.435(3). The requirement of a confirmatory test is thus applicable to bodily fluids which can be tested and retested. It is inapplicable, however, to the saliva strip test used here, which produces immediate results and no fluid that can be subjected to a confirmatory test.

Because the statutes and rules cited by claimant's representative are inapplicable, we turn to the Department's Drug and Alcohol Adjudication Policy, OAR 471-030-0125 (March 12, 2006), to determine whether the ALJ properly concluded that the claimant was disqualified from receipt of unemployment insurance benefits. Under OAR 471-030-0125(10)(a), a confirmatory test is required in the case of an initial positive blood or urine test for alcohol. No confirmatory test for a positive breathalyzer test is required, however. OAR 471-030-0125(10)(b). Although the Department's Drug/Alcohol Adjudication Policy does not specifically address the use of a saliva strip as a test for the presence of alcohol, the results produced by this type of test are analogous to those produced by a breathalyzer: as discussed above, the test results in no bodily fluids that can be retested. Accordingly, we conclude that the Department's Drug and Alcohol Adjudication Policy did not require confirmatory testing of the saliva strip test used by the employer.

Here, the employer used the saliva strip test to test the claimant three times for alcohol use; in two of these tests, claimant tested positive for the presence of alcohol. We agree with the ALJ that the two positive tests provided substantial evidence that claimant had a detectable amount of alcohol in his system in violation of the employer's reasonable drug and alcohol policy, and that claimant is, therefore, disqualified from the receipt of unemployment insurance benefits under the Department's Drug and Alcohol Adjudication Policy.

EAB reviewed the entire hearing record. On *de novo* review and pursuant to ORS 657.275(2), the hearing decision under review is **adopted**.

**DECISION:** Hearing Decision 14-UI-27956 is affirmed.

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

**DATE of Service:** December 4, 2014

**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](http://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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