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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
2015-EAB-0655

Reversed
No Disqualification

PROCEDURAL HISTORY: On April 21, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 83331). Claimant filed a timely request for hearing. On May 20, 2015, ALJ Clink conducted a hearing, and on May 26, 2015 issued Hearing Decision 15-UI-39035, affirming the Department's decision. On June 2, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant submitted a written argument, but did not 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). For this reason, EAB did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Peterson Power Systems employed claimant as a shop technician from May 20, 2013 until March 12, 2015.

(2) Although claimant worked in the employer's shop and was not required to drive when he performed his job duties, the employer knew he held a commercial driver's license (CDL). When claimant worked in the shop, he routinely wore rubber gloves to protect his hands from dirt, grease, oil and chemicals.

(3) The employer had a written drug and alcohol policy that was intended to control the effects of drugs and alcohol in the workplace. The policy applied to employees who held CDLs, whether or not they were required to drive in the course of their job duties. Claimant received a copy of the written drug and alcohol policy when he was hired. The policy allowed for random drug and alcohol testing of employees. The policy stated that an employee was considered to be under the influence of alcohol in the workplace, and would fail an alcohol test, if the employee had a blood alcohol content (BAC) equaling or exceeding 0.02 percent. The policy provided that an employee who failed a drug or alcohol test was required to enter into a last chance agreement with the employer to continue working. Audio at ~11:58. The policy also provided that an employee was subject to discharge if the employee "tampered" with a drug or alcohol test. Audio at ~14:15.

(4) On the night of March 10, 2015, claimant attended a party and consumed a great deal of alcohol. On March 11, 2015, claimant and other employees who held CDLs were randomly selected for drug and alcohol testing. Claimant's supervisor instructed him to report to a medical facility for the testing. Claimant placed his rubber work gloves in his back pants pocket, left the workplace and arrived at the medical facility with the gloves still in his pocket. Claimant was first administered a breathalyzer test and was then given a second breathalyzer test. Claimant was then asked to empty his pockets before providing a urine sample for drug testing. Claimant emptied his front pockets, but forgot that he had work gloves in his back pocket and did not empty that pocket. When claimant returned from the restroom to deliver his urine sample, a staff member noticed that he had taken the rubber work gloves in with him when he gave the sample and told him he was automatically considered to have failed the drug test because he could have used the gloves as a fluid container to dilute or adulterate his urine sample. Claimant was also informed at the medical facility that his BAC had been recorded at 0.028 and 0.022 percent from the two tests, both of which exceeded the employer's cut-off level of 0.020 percent.

(5) When the employer learned of claimant's test results, it decided not to allow claimant to continue his employment under a last chance agreement because the presence of the gloves in his back pocket suggested that he had tampered with the drug test, which was grounds for immediate discharge under the employer's drug policy. On March 12, 2015, the employer discharged claimant for tampering with the drug test administered on March 11, 2015.

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

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. A claimant is considered to have committed a disqualifying act if claimant failed to comply with the terms and conditions of a reasonable written employer drug and alcohol policy. ORS 657.176(9)(a)(A). A claimant is also considered to have committed a disqualifying act if claimant refused to cooperate with or subverted or attempted to subvert a drug or alcohol testing process that was required under an employer's reasonable written drug and alcohol policy. ORS 657.176(9)(a)(C). The employer carries the burden to show by a preponderance of the evidence that it discharged claimant for engaging in a disqualifying act. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 15-UI-39035, the ALJ concluded that the employer discharged claimant for committing a disqualifying act. The ALJ reasoned that claimant's disqualifying act was having an amount of alcohol in his system that exceeded the maximum BAC of 0.020 percent permitted under the employer's policy. Hearing Decision 15-UI-39035 at 4. We disagree.

From the testimony of the employer's witness at hearing, it is abundantly clear that the employer would not have discharged claimant if he had merely failed the alcohol test he was administered on March 11, 2015. Rather, the employer would have allowed him to continue employment under a last chance agreement. Audio at ~11:58. It is equally clear that the employer discharged claimant because it concluded he had violated the section of its drug and alcohol policy that prohibited him from "tampering" with a drug test by not removing the work gloves from his back pocket before giving his urine sample. Audio at ~12:15, ~13:21, ~14:15. The ALJ erred when she neglected to consider the act for which claimant was actually discharged, and did not evaluate whether that act was proven to have been a disqualifying act.

The word "tamper" as used in the employer's drug and alcohol policy should be given its common meaning. As a verb, it is usually defined to mean "to interfere so as to weaken or change for the worse" or "to interfere with (something) in order to cause damage or make unauthorized alterations." http://www.merriam-webster.com/dictionary/tamper; http://www.oxforddictionaries.com/us/definition/american_english/tamper. This meaning is consistent with the Department's drug and alcohol adjudication policy, which considers disqualifying acts to include "subverting" or "attempting to subvert" the results of a drug or alcohol testing process by, for example, interfering with the accuracy of the tests results or by diluting or adulterating a specimen submitted for testing. ORS 657.176(9)(a)(C)(v). As applied to the word "tamper" in the employer's drug and alcohol policy, and using the generally accepted meaning for that verb, it requires, at a minimum, some action undertaken to undermine or sabotage the integrity and accuracy of a drug or alcohol test. To support the legitimacy of the employer's discharge of claimant for allegedly tampering with the test result on March 11, 2015, the employer's witness could only present as evidence the fact, which claimant conceded, that he had rubber work gloves in his back pocket when he gave the urine sample. Audio at ~13:58, ~14:15. The employer's witness agreed that claimant regularly wore rubber gloves at work to protect his hands, and did not dispute that claimant very well could have forgotten that he had those gloves in his pocket when he was asked to give the urine sample. Audio at ~28:43. The evidence that claimant had those gloves in his back pocket, without more, is insufficient to establish, more likely than not, that he intended to use them to interfere with the drug testing process and that he did not inadvertently forget that they were there. The employer did not meet its burden to show that claimant tampered with the drug test on March 11, 2015 or that he attempted to do so. Because the employer was unable to make this showing, it also did not demonstrate that it discharged claimant for a disqualifying act.

The employer discharged claimant but not for a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-39035 is set aside, as outlined above.[1]

Susan Rossiter and D. P. Hettle, *pro tempore*;
J. S. Cromwell, not participating.

DATE of Service: <u>July 24, 2015</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 Court of Appeals website at courts.oregon.gov. Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

[1] This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.

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