

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0793

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 8, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant's discharge was for committing a disqualifying act (decision # 74059). Claimant filed a timely request for hearing. On June 15, 2015, ALJ Triana conducted a hearing, and on June 17, 2015 issued Hearing Decision 15-UI-40165, concluding claimant's discharge was not for a disqualifying act. On July 1, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Boise Cascade Company employed claimant as a millwright from November 12, 2004 to March 31, 2015.

(2) The employer had a policy that prohibited the use, possession or effects of drugs in the workplace. The policy prohibited employees from working with any detectable level of drugs in their systems. The policy provided for random drug testing at the employer's cost. The employer provided claimant with a copy of a handbook that contained the policy.

(3) The weekend prior to March 26, 2015, claimant consumed a cookie that contained marijuana. He was unaware the cookie contained marijuana at the time he consumed it.

(4) On March 26, 2015, the employer randomly selected the location claimant worked for random testing. Claimant provided a urine sample, which underwent initial testing on site. Initial testing showed the sample was "presumptive positive" for marijuana. Exhibit 1 at 2. The employer sent the urine sample to Blueline Services laboratory for confirmatory testing. The confirmatory test, which was performed using a different test panel, was positive for marijuana.

(5) On March 31, 2015, the employer discharged claimant for testing positive for marijuana.

CONCLUSIONS AND REASONS: Claimant's positive test for marijuana was not a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from benefits if an employee is discharged for a disqualifying act. OAR 657.176(9)(a) provides, in pertinent part, that an individual who tests positive for drugs has committed a disqualifying act. OAR 471-030-0125(10)(a) provides that, for purposes of ORS 657.176(9)(a), in order to determine whether an individual has failed a urine test or tested positive for drugs, the "initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory."

There is no dispute in this case that claimant consumed marijuana, that the following week the employer subjected claimant to a random urine test for drugs pursuant to its reasonable written policy, or that claimant tested "presumptive positive" for marijuana in both initial and confirmatory testing. The only issue remaining is whether the confirmatory testing was performed "in a federal or state licensed clinical laboratory."

In its written argument, the employer argued,

The Employer's Witness, Mr. Roberts, correctly testified during the hearing that it was his understanding that the Clinical Reference Laboratory (which is listed on the "Results of Controlled Substance Test") was accredited from The Substance Abuse and Mental Health Services Administration (SAMHSA). The Certificate of Accreditation has been attached with this letter.

See Employer's argument at 1. However, the employer's argument does not accurately reflect the employer's witness's testimony during the hearing, which was, when asked whether the lab in which the confirmatory testing was done was state or federally licensed,

I don't know the answer to that questions that I would want to testify to, no. I would assume so if our corporate offices selected it to do nationwide I would hope that it is. I – I – I guess you know I'm under oath, I don't know the answer to it.

Audio recording at ~ 21:45. Therefore, we must conclude that the record on review fails to show that the lab was SAMHSA accredited or otherwise licensed, making the employer's argument that it was licensed fall into the category of additional evidence or new information.

EAB is statutorily required to perform its review "on the record." ORS 657.275(2). EAB may consider additional evidence only if it is relevant and material *and* the party offering the information shows that "[f]actors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing." OAR 471-041-0090(2). Having erroneously claimed that the information it sought to have EAB consider was already in the record, the employer failed to show that factors or circumstances beyond its reasonable control prevented it from offering the information the information into evidence at the hearing. Therefore, EAB may not consider the employer's additional evidence, even though considering it would change the outcome of this decision.

The evidence in this record fails to show that the lab in which the employer conducted confirmatory testing of claimant's urine sample was state or federally licensed. Absent record evidence so

establishing, claimant's positive marijuana test cannot be considered a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

DECISION: Hearing Decision 15-UI-40165 is affirmed.

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

DATE of Service: July 10, 2015

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.

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