EO: 990
BYE: 201626

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

353
DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1324

Affirmed
No Disqualification

PROCEDURAL HISTORY: On August 12, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing a disqualifying act (decision # 94445). Claimant filed a timely request for hearing. On October 23, 2015, ALJ S. Lee conducted a hearing at which the employer did not appear, and on October 28, 2015 issued Hearing Decision 15-UI-46716, reversing the Department's decision. On November 3, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument which included evidence that was not presented during the hearing because the employer did not appear for the hearing. First, the employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2) (October 29, 2006). Second, while the employer explained that it sought to introduce this new evidence because its failure to appear at the hearing was "due to travel requirements by human resources," it did not show how the inability of a human resources representatives to participate in the hearing made it reasonably impossible for any other representative to appear and present evidence on the employer's behalf or prevented it from requesting a postponement of the hearing until the human resources representative could participate. The employer's bare assertion does not satisfy the requirements of OAR 471-041-0090(2)(b) (October 29, 2006), which states that EAB may not consider new information unless the party offering it shows that factors or circumstances beyond its reasonable control prevented it from appearing and presenting that information during the hearing. For both of these reasons, EAB did not consider the employer's written argument or the new information it sought to present when reaching this decision.

FINDINGS OF FACT: (1) Andritz Hydro Corporation employed claimant as an electrical foreman and crane operator from in July 2010 until claimant was suspended or discharged on June 30, 2015. Beginning on approximately August 13, 2014, claimant worked on the employer's Grand Coulee Dam project.

(2) The employer had a written drug and alcohol policy that prohibited the effects of drugs and alcohol in the workplace. Exhibit 1 at 4-9. The policy prohibited employees from, among other things, working when illegal or unauthorized drugs or controlled substances were present in their systems. Exhibit 1 at 4. The policy explicitly included marijuana among the unauthorized substances or drugs. Exhibit 1 at 4, 5. The policy also allowed for random, reasonable suspicion and post-accident drug testing. Exhibit 1 at 4-7. The employer's policy defined random testing to include the "testing of all employees at particular projects sites." Exhibit 1 at 7. The policy stated that employees who violated its provisions were subject to discipline up to and including discharge. Exhibit 1 at 9. Claimant received a copy of the employer's written drug and alcohol policy.

(3) On June 24, 2015, the employer required all of its employees who worked at the Grand Coulee Dam project to submit to drug testing. Claimant gave a urine specimen that day. On June 30, 2015, claimant's site manager told claimant to call Quest Diagnostics, the laboratory that had analyzed claimant's urine sample for the presence of unauthorized or controlled substances. Audio at ~21:21. A Quest representative told claimant that his urine sample had tested positive for marijuana.

(4) Later on June 30, 2015, claimant's site manager discussed the results of the drug test with him. The site manager reprimanded claimant for failing the drug test. The site manager told claimant that he needed to leave his tool box on the job site, "take care" of his violation of the employer's drug policy, and then call the employer's human resources representative about returning to work. Audio at ~12:58. No employer representative told claimant that he discharged as a result of failing the employer's June 24, 2015 drug test, and claimant did not receive any papers from the employer showing his employment status after June 30, 2015. After June 30, 2015, claimant did not return to work. Sometime in October 2015, claimant's site manager contacted claimant about returning to work in December 2015.

CONCLUSIONS AND REASONS: Claimant was discharged or suspended on June 30, 2015, but not for committing a disqualifying act.

The evidence in the record is not clear as to whether claimant was discharged or suspended from work as a result of failing the drug test administered on June 24, 2015. The most that can be discerned from the facts in the record is that after June 30, 2015, when it learned of the results of claimant's drug test, the employer was unwilling to allow claimant to continue working until he "took care" of his failure to pass the test. For purposes of this decision, we assume that claimant was either discharged or suspended due to failing the drug test. Since the analysis of whether claimant was disqualified from benefits due to a suspension or discharge is the same, it is immaterial whether his failure to work after June 30, 2015 was attributable to a discharge or suspension.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged or suspended claimant for committing a disqualifying act. ORS 657.176(9)(a) states that an individual is considered to have committed a disqualifying act if the individual failed to comply with the terms and conditions of a reasonable written policy established by an employer that governs the effects of alcohol or drugs in the workplace and which may provide for certain specified types of drug testing. OAR 471-030-0125(3) (March 12, 2006) provides that a written employer drug policy is reasonable if, among other things, the employer follows its own policy, a copy of the policy was given to the individual and, if the policy requires drug testing, it provides for random, blanket or periodic testing. With few exceptions, none of which apply her, when an individual's disqualification is based on failing

a drug test, the initial test result must be confirmed by a second test conducted by a federal or state licensed clinical laboratory in order to conclude that the failure was disqualifying act. OAR 471-030-0125(10).

Here, the employer's written drug and alcohol policy met the first standards for reasonableness since it was intended to control the effects of drugs and alcohol in the workplace and claimant was given a copy of that policy. Although the ALJ concluded that it was not reasonable because it defined a "random" drug test in a manner that encompassed a permissible "blanket" test, this was not a fatal defect. *See and compare* OAR 471-030-0125(5) and Exhibit 1 at 7; Hearing Decision 15-UI-46716 at 7. Regardless of the language used in the employer's policy, the type of testing it described under the rubric of a "random" test was otherwise allowed as a "blanket" test. That the employer did not give the correct title to the type of testing it conducted should not render its drug policy unreasonable within the meaning of OAR 471-030-0125 (3) and OAR 471-030-0125(5).

Despite our disagreement with the ALJ's reasoning, there is no evidence in the record that the employer's drug and alcohol policy met the final requirement for constituting a reasonable written policy, *i.e.*, that the employer followed its own policy. OAR 471-030-0125(3)(a). There was no evidence in the record that Quest Diagnostics, which analyzed claimant's urine specimen and concluded that it was positive for marijuana, was a federally or state licensed clinical laboratory as required by OAR 471-030-0125(10). As a result, the test result on which the employer based its discharge or suspension was not valid, and the employer was precluded from showing that claimant's result from the test was a disqualifying act. Audio at ~15:08, ~15:23. For these reasons, the employer did not meet its burden to show that it discharged or suspended claimant for a disqualifying act.

Claimant is not disqualified from receiving unemployment insurance benefits based on his discharge or suspension from employment on June 30, 2015.

DECISION: Hearing Decision 15-UI-46716 is affirmed.

Susan Rossiter and J. S. Cromwell

DATE of Service: <u>December 4, 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.

<u>Please help us improve our service by completing an online customer service survey</u>. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.