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BYE: 201708

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
2016-EAB-0598

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act (decision # 152949). Claimant filed a timely request for hearing. On May 3, 2016, ALJ S. Lee conducted a hearing, and on May 5, 2016 issued Hearing Decision 16-UI-58996, the employer discharged claimant, but not for committing a disqualifying act. On May 20, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record and the employer's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

FINDINGS OF FACT: (1) Boise Cascade Company employed claimant as a bander operator from January 7, 2013 to February 25, 2016.

(2) The employer had a written alcohol and drug policy that, among other things, prohibited employees from reporting to work with a detectable level of a controlled substance or illegal drug present in his or her body. The policy provided for drug and alcohol testing, in relevant part, as follows:

> All employees directly or indirectly involved in a serious on-the-job accident which requires one or more persons to obtain medical care by a physician…will be required to submit to a drug and alcohol screening test *when there is reason to suspect that alcohol or drugs were involved in the accident*…(emphasis added). The test will be administered as soon as possible after the injury has been treated.

Exhibit 1, Policy on Drugs, Item B, Accidents. An initial drug test providing a positive test result for a controlled substance or illegal drug required a second confirmatory test. Violation of the policy

subjected an employee to discipline, up to and including termination. Claimant received a copy of the employer's alcohol and drug policy at hire and in 2014, when it was modified.

(3) On February 16, 2016, claimant was injured at work while operating a bander and was transported to a hospital where he received medical care. While there, his shift supervisor asked him to submit a urine sample for a drug screen. Claimant submitted an initial sample, which was rejected, and then asked to submit a second sample, which he did. The second sample tested positive for methamphetamines and that result was confirmed by a second test conducted at a federally licensed clinical laboratory. The employer paid for the initial and confirmatory tests.

(4) On February 25, 2016, the employer met with claimant and informed him that he was being discharged because he had tested positive for methamphetamines.

CONCLUSIONS AND REASONS: We agree with the ALJ. The employer discharged claimant, but not for a disqualifying act under ORS 657.176(2)(h).

ORS 657.176(2)(h) provides that an individual is disqualified from receiving unemployment insurance benefits if he has committed a disqualifying act described in subsection ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual has committed a disqualifying act if he tests positive for an unlawful drug in connection with employment. Under OAR 471-030-0125(2)(e)(A) (March 12, 2006), an individual "tests positive" for an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy and, at the time of the test, the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by the employer's policy. To determine whether an individual tests positive for drugs for purposes of ORS 657.176(9)(a) and OAR 471-030-0125, an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

A "reasonable" written drug policy is defined, in relevant part, as one that prohibits the effects of drugs in the workplace, *is followed* by the employer, has been provided to the individual in writing, and, where the policy provides for drug testing, the employer has probable cause for requiring the individual to submit to the test. OAR 471-030-0125(3) (emphasis added). OAR 471-030-0125(4) provides in relevant part, that an employer has probable cause to require an employee to submit to a test for drugs if 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 in the workplace. OAR 471-030-0125(4)(a). Such evidence may include, but is not limited to, bizarre behavior in the workplace, a change in productivity, repeated tardiness or absences, or behavior which causes an on-the-job injury or causes substantial damage to property. *Id*. No employer policy is reasonable if the employee is required to pay for the cost of the test. OAR 471-030-0125(6). In a discharge case, the employer has the burden to establish that the claimant is disqualified from the receipt of benefits. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

The employer discharged claimant for reportedly testing positive for methamphetamines in violation of the employer's drug policy. We first address if the employer's drug policy was reasonable as defined by OAR 471-030-0125. The policy prohibited the effects of drugs in the workplace, had been published and was provided to claimant in both at hire and in 2014, and claimant was not required to pay for the cost of drug testing. Thus, in those respects, the

employer's policy was reasonable.

The employer also arguably had probable cause to test claimant under OAR 471-030-0125(4)(a), which allows for probable cause testing based on evidence of behavior which causes an on-the-job injury. However, the employer's policy provided for drug testing of an employee involved in a work-related accident that resulted in an injury requiring medical care only "when there [was] reason to suspect that alcohol or drugs were involved in the accident." Although specifically required by the language of the policy, the employer cited no evidence that gave it "reason to suspect" that alcohol or drugs had been involved in the accident. The employer did not assert that claimant exhibited any bizarre behavior, that there was a change in his productivity, that he was repeatedly late or absent from work, that he was suspected of using drugs or alcohol by a coworker, or that there was any other evidence that made the employer suspect that alcohol or drugs had been involved in the accident. Accordingly, the record fails to show that the employer followed its own policy with claimant regarding when, in the event of an accident requiring medical care for one or more employees, an employee was required to submit to a drug and alcohol screening test. Therefore, because the employer's policy was not followed, it was not "reasonable" as that term is defined under OAR 471-030-0125(3), and claimant could not "test positive" for drugs as that phrase is defined under OAR 471-030-0125(2)(e).[1]

The employer failed to meet its burden to show that claimant committed a disqualifying act under ORS 657.176(9)(a)(F), and claimant is not disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 16-UI-58996 is affirmed.

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

DATE of Service: <u>June 27, 2016</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.

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[1] For the same reasons, the employer's post-accident testing policy also did not authorize a uniformly applied blanket test of all employees involved in an injury accident. See, OAR 471-030-0125(5)(c).