

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0856

Affirmed
No Disqualification

PROCEDURAL HISTORY: On June 3, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for committing an act that disqualified him from receiving benefits (decision # 104543). Claimant filed a timely request for hearing. On June 16, 2016, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for June 30, 2016. On June 30, 2016, ALJ S. Lee conducted a hearing, and on July 8, 2016 issued Hearing Decision 16-UI-63444, concluding that claimant did not commit a disqualifying act. On July 18, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 16-UI-63444, the ALJ concluded that claimant is not disqualified from receiving benefits because the employer failed to show his initial positive urine test for alcohol was confirmed by a test conducted in a federal or state licensed clinical laboratory, as required under OAR 471-030-0125(10)(a) (March 12, 2006).¹ With its application for review, the employer submitted written argument asking EAB to consider documents containing new information, not offered into evidence at the hearing, purporting to show that the confirmatory test was conducted in a federal or state licensed clinical laboratory. However, EAB may consider the employer's new information only if the employer establishes that factors or circumstances beyond its reasonable control prevented it from offering the information into evidence at the hearing. *See* OAR 471-041-0090(2)(b) (October 29, 2006).

In support of its request, the employer asserts that its hearing representative and witness was not able to "100% confirm that the testing facilities and lab was properly licensed and certified because she was not at the place of business to retrieve the verifying document from the test facility and lab at the time of the hearing call." As a preliminary matter, we note that the employer's hearing representative and witness was not merely unable to "100% confirm" that the confirmatory test was conducted in a federal or state licensed clinical laboratory. When asked by the ALJ, the representative replied, "You know what, I cannot verify . . . I don't know that, I'm sorry." Audio Record at 45:15-45:30. The hearing record therefore supports the ALJ's determination that the employer failed show claimant's initial positive

¹ Hearing Decision 16-UI-63444 at 2, 6-7.

urine test for alcohol was confirmed by a test conducted in a federal or state licensed clinical laboratory, as required under OAR 471-030-0125(10)(a) (March 12, 2006).

With respect to the employer's assertion that its representative was unable to retrieve the information at the time of the hearing, we note that the notice of hearing stated that one of the issues to be considered was, "Is the claimant subject to denial of benefits under the provisions of the Employment Department drug and alcohol policy? (ORS 657.176(2)(h), (9), (10) and (13), and OAR 471-030-0125.)"² Included with the notice of hearing, under the heading, "**LAWS AND RULES[,] DRUG AND ALCOHOL**", was a copy of the applicable statutes and rule, including OAR 471-030-0125(10)(a).³ It was within the employer's reasonable control to review the notice of hearing and the applicable statutes and rules, retrieve, prior to the hearing, information regarding whether claimant's confirmatory test for alcohol was conducted in a federal or state licensed clinical laboratory, and offer that information into evidence at the hearing. The employer's request for EAB to consider its new information therefore is denied.

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 16-UI-63444 is affirmed.

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

DATE of Service: August 12, 2016

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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² June 16, 2016 Notice of Hearing at 1.

³ *Id.* at 18-20.