

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1250

Reversed
Disqualification

PROCEDURAL HISTORY: On September 28, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act under the Department's drug and alcohol adjudication policy (decision # 145818). Claimant filed a timely request for hearing. On October 27, 2016, ALJ Frank conducted a hearing, and on November 2, 2016, issued Hearing Decision 16-UI-70410, reversing the Department's decision. On November 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the employer's written argument to the extent it was based on the record.

FINDINGS OF FACT: (1) Crestline Construction Co LLC employed claimant as a truck driver from September 21, 2015 to June 27, 2016.

(2) The employer had a written policy that prohibited the effects of drugs, including marijuana, in the workplace, and provided for drug testing under several circumstances, including pre-employment, random, "post-accident," or based on "reasonable suspicion." Audio Record ~ 18:15 to 18:30. The employer's post-accident testing provision read as follows:

A drug or alcohol test will be conducted on all employees involved in accidents occurring during work time or while on company property. Covered accidents include, but are not limited to, accidents that any employee caused or contributed to that involved personal injury to employees or others which necessitates medical attention or damage to company property or damage to a client's property.

Audio Record ~ 18:40 to 19:05.

(3) With respect to drug testing, the policy stated that urine samples would be tested at a SAMHSA (Substance Abuse and Mental Health Services Administration) federally certified lab and that the testing would consist of an initial test followed by a confirmatory test using gas chromatography – mass spectrometry (GC/MS) methodology. The policy was a zero tolerance policy for several drugs,

including cannabinoids, meaning that any level of the prohibited substance detected in the urine through testing violated the policy. The policy was published and communicated to claimant and provided to him in writing, which, by his signature, claimant acknowledged receiving, reading and understanding.

(4) On June 24, 2016, claimant was involved in a vehicular accident while driving an employer dump truck which caused property damage to the vehicle. The employer required claimant to submit a urine sample for a post-accident drug test. The urine sample was taken and tested in a SAMHSA certified clinical laboratory. The initial test was positive for cannabinoids (marijuana), as was the GC/MS confirmatory test conducted by the same laboratory. When claimant was questioned about the positive test result, he admitted that he had used marijuana the weekend before while fishing with a friend.

(5) On June 27, 2016, the employer discharged claimant because he tested positive for marijuana on June 24, 2016.

CONCLUSIONS AND REASONS: We disagree with the ALJ. Claimant is disqualified from the receipt of benefits because he committed a disqualifying act under the Department's drug and alcohol adjudication policy.

ORS 657.176(2)(h) provides that a claimant is disqualified from receiving benefits if he (or she) committed a disqualifying act described in ORS 657.176(9). ORS 657.176(9)(a)(F) provides that an individual has committed a disqualifying act if he tests positive for a unlawful drug in connection with employment. For purposes of ORS 657.176(9)(a)(F), 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, the amount of drugs determined to be present in the individual's system equals or exceeds the amount prescribed by such policy, and the initial urine test is confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(2)(e) (March 12, 2006), OAR 471-030-0125(10)(a). A written employer policy is reasonable if it prohibits the effects of drugs in the workplace, is followed by the employer, has been published and communicated to the individual or provided to the individual in writing, and when the policy provides for drug testing, the employer has probable cause for requiring the individual to take the test, or the policy provides for blanket drug testing. OAR 471-030-0125(3). A "blanket" test for drugs is a test that is applied uniformly to a specified group or class of employees. OAR 471-030-0125(5)(c).

In the present case, it is undisputed that claimant's drug test was administered in accordance with the provisions of the employer's policy, that the amount of drugs determined to be present in claimant's system equaled or exceeded the amount proscribed by the policy, and that the initial urine test was confirmed by a test conducted in a federal or state licensed clinical laboratory. It also is undisputed that the employer's policy prohibited the effects of drugs in the workplace, was followed by the employer, had been published and communicated to claimant or provided to him in writing, and provided for drug testing. However, in Hearing Decision 16-UI-70410, the ALJ concluded that claimant's positive drug test was not disqualifying because the employer lacked probable cause to test him based on his evaluation of the evidence that the accident was likely caused by equipment failure rather than claimant's behavior. Hearing Decision 16-UI-70410 at 5. We disagree that claimant's positive drug test was not disqualifying.

The ALJ did not address whether probable cause was necessary for the employer to test claimant under its policy and the undisputed facts. The employer's policies for post-accident drug or alcohol testing provide for tests that are applied uniformly to a specified group or class of employees, those involved in accidents, and therefore provide for a "blanket" test for drugs or alcohol as defined under OAR 471-030-0125(5)(c). Here, the employer's policy was clear that a drug or alcohol test would be conducted on "all employees involved in accidents" during work time involving physical injury or damage to company property, and that covered accidents that "[we]re not limited" to those an employee caused or contributed to. We therefore conclude that the employer's policy provided for blanket drug testing, and disagree with the ALJ that the employer was required to have probable cause for requiring claimant to take the test.

The employer's policy prohibited the effects of drugs in the workplace, was published and communicated to claimant and provided to him in writing, provided for blanket drug testing post-accident and was followed by the employer after claimant's vehicular accident during work time. Accordingly, the employer's policy was "reasonable" as defined under OAR 471-030-0125(3). Consequently, claimant "tested positive" for marijuana under OAR 471-030-0125(2)(e) and OAR 471-030-0125(10)(a), committed a disqualifying act under ORS 657.176(9)(a)(F), and is disqualified from receiving benefits under ORS 657.176(2)(h).

DECISION: Hearing Decision 16-UI-70410 is set aside, as outlined above.

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

DATE of Service: December 1, 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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