

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0657**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On February 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act (decision # 92835). Claimant filed a timely request for hearing. On May 12, 2017, ALJ Meerdink conducted a hearing and issued Hearing Decision 17-UI-83326, reversing the Department's decision. On May 26, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Turtle Islands Foods, Inc. employed claimant from January 11, 2016 until January 4, 2017, last as a delivery driver.

(2) The employer had a written drug and alcohol policy to control the effects of drugs and alcohol in the workplace. The policy prohibited employees from reporting for work under the influence of alcohol, other intoxicants or controlled substances appearing in Schedules I through V of Section 812 of the Controlled Substances Act and regulations promulgated under that section. The policy authorized drug or alcohol testing if, among other things, the employer had reasonable suspicion that an employee was working under the influence of drugs or alcohol or if the employee was involved in a workplace accident that caused an injury requiring medical attention. The employer provided a written copy of its drug and alcohol policy to claimant when he was hired.

(3) On December 12 and 14, 2016, claimant was involved in off-site accidents while operating one of the employer's trucks. On December 15, 2016, claimant had an accident while operating a pallet jack in the workplace. As a result, a bin that claimant was transporting fell on him and caused the following injuries: four broken ribs, a concussion, a torn rotator cuff and two bulging disks. Approximately one hour after the accident, the employer took claimant to the hospital for medical treatment. Claimant was discharged from the hospital at approximately 5:00 p.m.

(4) On December 16, 2016, the next day, claimant was instructed to report for a drug and alcohol test because he had been involved in a workplace accident causing injuries that required medical attention the day before. Claimant reported for the test sometime before 11:55 a.m. and gave a urine sample at

Mid-Columbia Medical Center. That sample was sent to a laboratory, Bio-Medical Testing Services, for analysis. Bio-Medical concluded that the claimant's urine sample was positive for amphetamine and methamphetamine. It was not known if Bio-Medical was a state or federally licensed laboratory. A second test was not performed on the sample to confirm the accuracy of Bio-Medical's analysis of claimant's urine sample.

(5) On January 4, 2017, the employer received the results of claimant's drug test from Bio Medical. That day, the employer discharged claimant for having a drug test that was positive for amphetamine and methamphetamine.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for a disqualifying act.

ORS 657.176(2)(h) states that an individual shall be disqualified from receiving benefit if the individual committed a disqualifying act as described in ORS 657.176(9) or ORS 657.176(10). ORS 657.176(9)(A) states that an individual is considered to have committed disqualifying act if the individual fails to comply with the terms and conditions of the an employer's reasonable written policy established to govern the effects of drugs or alcohol in the workplace, which may include blanket, random, periodic or probable cause testing. ORS 657.176(9)(a)(F) states that an individual has committed a disqualifying act if the individual tests positive for alcohol or an unlawful drug in connection with employment, and ORS 657.176(9)(a)(D) states that an individual has committed a disqualifying act if the individual is under the influence of intoxicants while performing services for the employer. OAR 471-030-0125(2)(c) (March 12, 2006) defines "under the influence" for purposes of an employer's reasonable drug and alcohol policy to mean that the individual has "any detectible level" of the prohibited substance in the individual's system, unless the applicable drug and alcohol policy specifies a different level. OAR 471-030-0125(2)(h) defines "in connection with employment" to mean where a positive test result affects or has a reasonable likelihood of affecting the employee's work or the employers interest and/or workplace. OAR 471-030-0125(3) defines "drug" to mean a controlled substance as defined in ORS 475.005.

In connection with determining if an employer's drug and alcohol policy is a reasonable one for purposes of ORS 657.176(9), it must prohibit the use sale, possession or effects of drugs or alcohol in the workplace, must be written or published or provided to the individual, must provide only for specified types of during testing, including probable cause testing, and the employer must follow its own policy. OAR 471-030-0125(3). "Probable cause" for drug or alcohol testing includes being involved in a workplace accident that causes an on-the-job injury. OAR 471-030-0125(4)(a). If an individual's blood or urine tests positive for drugs or alcohol, in order to conclude that the individual has failed that test or is "under the influence," the initial positive test result must be confirmed by a test conducted in a federal or state licensed clinical laboratory. OAR 471-030-0125(10)(a).

Since the employer's drug and alcohol policy was written, a copy of it was given to claimant upon hire, it was obviously intended to govern the effects of drugs and alcohol in the workplace, it permitted only the types of testing allowed under the statute and there was no evidence that the employer did not follow its own policy, the policy was reasonable. Because claimant's involvement in a workplace accident that caused injury to him precipitated his drug test, that involvement was probable cause for the employer to require him to submit to the drug test. Claimant's drug test was positive for amphetamine and methamphetamine, controlled substances within the meaning of ORS 475.005(6), 21 USC §802(6) and

21 CFR §1308.12(d)(1) and (d)(2). Even so, however, we must turn to the issue of whether claimant's positive result on the drug test was a disqualifying act.

The testimony of the employer's witness was that he did not know whether Bio-Medical Testing Service, the laboratory that concluded claimant had tested positive for illicit drugs was a federally or state licensed clinical laboratory, as it needed to be in order to conclude, for purposes of the Department's drug and alcohol adjudication policy, that claimant had failed the test that was administered to him. Audio at ~12:53; OAR 471-030-0125(10)(a). Assuming Bio-Medical was so licensed, the employer's witness did not believe and did not contend that a second test, confirming Bio-Medical's positive test result, was conducted. Audio at ~13:37. Absent evidence that a second confirmatory test also yielded a positive result on the urine sample claimant submitted, it cannot be concluded that claimant failed the drug test, that he violated the employer's drug and alcohol policy by having in controlled substances in his system, or that he was under the influence of such controlled substances while performing services for the employer. *See* OAR 471-30-0125(10)(a). As such, the employer did not meet its burden to show that claimant committed a disqualifying act arising from the positive test result that Bio-Medical recorded.

The employer did not show that claimant committed a disqualifying act. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 17-UI-83326 is affirmed.

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

**DATE of Service:** June 22, 2017

**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](http://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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