

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0921

Affirmed
No Disqualification

PROCEDURAL HISTORY: On March 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for a disqualifying act (decision # 151901). Claimant filed a timely request for hearing. On April 27, 2017, ALJ Shoemake conducted a hearing, and on April 28, 2017 issued Hearing Decision 17-UI-82147, affirming the Department's decision. On May 5, 2017, claimant filed an application for review of Hearing Decision 17-UI-82147 with the Employment Appeals Board (EAB). On May 31, 2017, EAB issued EAB Decision 2017-EAB-0921, reversing Hearing Decision 17-UI-82147 and remanding the case for additional proceedings. On July 21, 2017, ALJ Shoemake conducted the remand hearing, and on July 24, 2017 issued Hearing Decision 17-UI-88743, concluding that claimant's discharge was not for a disqualifying act. On August 2, 2017, the employer filed an application for review of Hearing Decision 17-UI-88743 with EAB.

EAB considered claimant's written argument when reaching this case, but only to the extent it was relevant and based on the hearing record.

FINDINGS OF FACT: (1) Lineage Logistics, LLC employed claimant as a forklift operator, last from February 3, 2009 to March 6, 2017. Claimant was previously discharged from a prior term of employment with the same employer because of a positive drug test.

(2) The employer had a policy that prohibited the use and effects of drugs and alcohol in the workplace and provided for reasonable suspicion drug testing. On February 10, 2015, the employer provided claimant with a copy of its policy.

(3) On March 2, 2017, claimant's supervisor and another employee observed claimant engage in behavior that made them suspect he was using drugs. The employer sent claimant to Bio-Med Testing Services for a urinalysis drug test, and suspended him pending receipt of the results. Bio-Med sent claimant's urine sample to Legacy MetroLab for testing.

(4) On March 4, 2017, Legacy MetroLab sent Bio-Med a report that stated claimant had tested positive for codeine, morphine, amphetamine and methamphetamine. On March 6, 2017, the employer received a copy of Bio-Med's report and discharged claimant for testing positive for drugs.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's discharge was not for a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for committing a disqualifying act. ORS 657.176(9)(a)(F) provides that testing positive for an unlawful drug is considered a disqualifying act. In the case of a positive blood or urine test for drugs or alcohol, in order to determine whether an individual tests positive, "an initial test must be confirmed by a test conducted in a federal or state licensed clinical laboratory." OAR 471-030-0125(10)(a) (March 12, 2006).

The dispositive issue in this case is whether or not claimant's positive test for codeine, morphine, amphetamine and methamphetamine was confirmed by another test. The employer submitted the reports from Bio-Med and Legacy MetroLab into evidence. The reports were not self-explanatory, did not establish on their faces whether confirmatory testing had been done, and the employer's witness did not know and could not say what the reports meant.¹ When asked whether or not there was a confirmatory test, what test it was, and whether it was different than the initial test on claimant's urine sample, the employer could not provide the relevant information. *See* Audio recording at ~ 16:45, 17:45, 18:10. In the absence of evidence that claimant's urine sample underwent a confirmatory test, his positive drug test cannot be considered a disqualifying act for purposes of an unemployment insurance benefits determination. In reaching this decision, we acknowledge that claimant worked for the employer in a safety-sensitive position as a forklift driver, and that it appears from the Legacy MetroLab test results that he had significant amounts of amphetamines and opiates in his system at the time of his drug test and, likely, while he was at work. Nevertheless, the applicable administrative rules are clear that a positive test for drugs is not disqualifying unless the employer establishes on the record that it is more likely than not that confirmatory testing occurred as required.

During the hearing, the employer asked for additional time to provide the ALJ information about whether or not claimant's initial drug test was confirmed, and the ALJ denied the request. July 21, 2017 hearing, Audio recording at ~ 19:35-20:30. The ALJ did not err in doing so. Both notices of hearing the Office of Administrative Hearings mailed to the employer included OAR 471-030-0125(10), which explains the requirement that lab tests be confirmed before a positive test is considered a disqualifying act. The ALJ informed the employer during the first hearing that the burden of proof was on the employer to establish that claimant's discharge was for committing a disqualifying act. April 27, 2017 hearing, Audio recording at ~ 4:10. EAB remanded specifically to give the employer the opportunity to provide that information, cited to OAR 471-030-0125(10), and wrote in Employment Appeals Board Decision 2017-EAB-0544 that, "[i]n the absence of . . . information" about "whether or not the 'initial' positive urinalysis test for heroin, amphetamine and methamphetamine was 'confirmed' by a second

¹ For instance, the Legacy MetroLab report had a column titled "Confirm Cutoff" but neither the report nor the employer's witness explained what that meant. *See* Exhibit 3. The "Tests Requested" information displayed as sets of numbers, some separated by spaces or slashes, but neither the report nor the employer's witness indicated what that meant. *Id.* The Bio-Med report referred several times to the "test" that was performed, but always used test in the singular form, not plural, and did not contain any information suggesting that a confirmatory test occurred. *See* Exhibit 2.

round of testing,” “the record fails to show whether or not claimant’s positive drug test should be considered a disqualifying act for purposes of unemployment insurance benefits.” EAB Decision 2017-EAB-0544 at 1. Nevertheless, the employer attended the hearing without having ascertained whether or not the confirmatory testing occurred. We therefore conclude that the employer had sufficient notice of the information that was required of it, and the ALJ’s refusal to allow the employer additional time to provide that information was not a denial of due process or an abuse of discretion.

For the reasons explained herein, claimant’s positive drug test was not a disqualifying act. He is therefore not disqualified from benefits because of this work separation.

DECISION: Hearing Decision 17-UI-88743 is affirmed.

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

DATE of Service: August 23, 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. 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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