

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1428

Reversed & Remanded

PROCEDURAL HISTORY: On August 11, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for a disqualifying act (decision # 154447). The employer filed a timely request for hearing. On November 29, 2017, ALJ Janzen conducted a hearing, at which claimant failed to appear, and on December 1, 2017, issued Hearing Decision 17-UI-98006, affirming the Department's decision. On December 12, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument with its application for review. In its argument, the employer requested "the opportunity to identify the actual illegal drug that was found in Mr. Stillinger's system at the time of random testing." Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the party providing the information demonstrates that circumstances beyond its reasonable control prevented the party from offering the information at the hearing. Based on our disposition of this matter, we need not and do not decide whether to consider the new information the employer now wishes to provide under OAR 471-041-0090 (October 29, 2006), as the employer will have the opportunity to offer the information in question at the hearing on remand.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-98006 must be reversed, and this matter remanded for further proceedings consistent with this order.

Claimant was a commercial driver for the employer and subject to U. S. Department of Transportation (DOT) regulations prohibiting the operation of a commercial vehicle if the driver tested positive for a controlled substance. On March 22, 2017, the employer received information that following a random test for drugs, claimant had tested positive for a prohibited drug under its drug and alcohol policy and discharged claimant for that reason.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for a disqualifying act. ORS 657.176(9)(a)(F) defines a disqualifying act to include testing positive for cannabis or an unlawful drug in connection with employment. For purposes of ORS 657.176(9), an individual "tests positive" when the test is administered in accordance with the provisions

of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test: (A) The amount of drugs or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement; or (B) The individual has any detectable level of drugs or alcohol present in the individual's system if the policy or agreement does not specify a cut off level.¹ OAR 471-030-0125(2)(e)(March 12, 2006). "Drug" means a controlled substance as defined in ORS 475.005. ORS 657.176(13)(b). ORS 475.005 defines "drug" as "a drug . . . classified in Schedules I through V under the federal Controlled Substances Act, 21 U.S.C. 811 to 812." 26 USC §812 Schedule 1 at (c)(10). For purposes of ORS 657.176(9) and 657.176(13), "unlawful drug" means "a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. This term does not include a drug prescribed and taken by the individual under the supervision of a licensed health care professional and used in accordance with the prescribed directions for consumption, or other uses authorized by law." OAR 471-030-0125(2)(g). It is no defense or excuse under ORS 657.176(9) that the individual's separation resulted from alcohol use, cannabis use, unlawful drug use, alcoholism or addiction to cannabis or drugs. ORS 657.176(9)(c).

A written employer policy is reasonable if it prohibits the effect 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 submit to the test, or the policy provides for random, blanket or periodic testing. OAR 471-030-0125(3). A "random" test for drugs is a test given to a sample drawn from a population in which each member of the population has an equal chance to be selected for testing. OAR 471-030-0125(5)(a). For the purposes of ORS 657.176(9)(a), no employer policy is reasonable if the employee is required to pay for the cost of the test. OAR 471-030-0125(6). In the case of a positive blood or urine test for drugs, in order to determine whether an individual fails a test or 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).

The record establishes that the employer's drug policy prohibited the effect of drugs in the workplace, provided for random drug testing and did not require the employee to pay for the cost of the test. The

¹ OAR 471-030-0125(2)(e) was amended, effective January 7, 2018, to include references to a positive test for "cannabis" as follows:

"(2)(e) For purposes of ORS 657.176(9), an individual "tests positive" for alcohol, cannabis, or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement, and at the time of the test:

(A) The amount of drugs, cannabis, or alcohol determined to be present in the individual's system equals or exceeds the amount prescribed by such policy or agreement; or

(B) The individual has any detectable level of drugs, cannabis, or alcohol present in the individual's system if the policy or agreement does not specify a cut off level."

However, for the purpose of this case, because claimant tested positive in March 2017, version of OAR 471-030-0125(2)(e) in effect at that time, as referenced above, controls.

record does not establish that the employer published and communicated its complete drug and alcohol policy to claimant or provided it to him in writing, that his initial positive blood or urine test for drugs was confirmed by a test conducted in a federal or state licensed clinical laboratory, and that the employer followed its policy in claimant's case. Moreover, at hearing, when asked by the ALJ to identify the drug which claimant tested positive for, the employer's witness only responded that the drug was "unlawful" asserting that it believed it was prohibited by federal confidentiality laws from disclosing the actual drug in question. Audio Record ~ 24:00 to 26:45. In Hearing Decision 17-UI-98006, after finding that the drug claimant tested positive for was "unknown", the ALJ concluded that the employer discharged claimant, but not for a disqualifying act, reasoning,

While the employer provided evidence that claimant tested positive for an "unlawful" drug, it did not provide evidence of what the unlawful drug was. Consequently, the finder of fact is unable to independently ascertain whether claimant actually tested positive for an unlawful drug.

Hearing Decision 17-UI-98006 at 2, 4.

We agree that the employer failed to provide documentary or other evidence that plainly established the actual identity of the drug in question, which employer's typically do. However, considering the obligations of due process, we conclude the ALJ did not sufficiently inquire regarding basic facts sufficient for a finder of fact to infer the identity of the drug and whether the drug in question was "unlawful." For example, the ALJ should have asked the employer's witness a general question regarding how the employer determined that the drug in question was "unlawful." More specifically, the ALJ should have asked whether it was a drug that was unlawful *only* under the federal Controlled Substances Act or was it a drug that was unlawful under both federal and Oregon law? The ALJ also should have inquired, in reference to OAR 471-030-0125(2)(g), whether the drug in question was a drug prescribed and taken by claimant under the supervision of a licensed health care professional and used by claimant in accordance with the prescribed directions for consumption, or other uses authorized by law. With regard to the publication and communication of the employer's drug policy to claimant, the ALJ should have inquired if, at the quarterly meetings it referred to at hearing, the employer communicated its entire drug policy to employees in attendance and whether claimant was in attendance. Audio Record ~ 18:30 to 22:00. With regard to whether claimant's initial positive blood or urine test for drugs was confirmed by a second test conducted in a federal or state licensed clinical laboratory, the ALJ should have inquired about and compared the two test results and the identity and location of the federal or state licensed clinical laboratory involved. In the absence of such information, 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.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant's discharge was for a disqualifying act, Hearing Decision 17-UI-98006 must be reversed, and this matter remanded for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-98006 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

DECISION: Hearing Decision 17-UI-98006 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: January 12, 2018

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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