

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0093

Reversed & Remanded

PROCEDURAL HISTORY: On November 7, 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 # 101425). The employer filed a timely request for hearing. On January 4, 2018, ALJ Clink conducted a hearing at which claimant failed to appear, and on January 8, 2018, issued Hearing Decision 18-UI-100409, affirming the Department's decision. On January 29, 2018, 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 presented new information not presented at hearing, including information regarding claimant's alleged drug use, toxicology information for marijuana, when claimant's accident occurred and why there was a delay between claimant's accident and drug test. 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 EAB's disposition of this matter, we need not decide whether to consider the new information the employer now wishes to provide under OAR 471-041-0090 (October 29, 2006), because the employer will have the opportunity to offer the information in question at the hearing on remand.

CONCLUSIONS AND REASONS: Hearing Decision 18-UI-100409 is reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

On September 24, 2017, claimant had an accident while working for the employer, Goodwill Industries, LLC. Claimant had a drug test on September 29, 2017. The employer had a zero tolerance policy against drugs or alcohol in the workplace, and discharged claimant on October 2, 2017 when the results of his drug test were positive for marijuana.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if an individual has committed a disqualifying act as described in ORS 657.176(9). ORS 657.176(9)(a)(A) provides that it is a disqualifying act if an individual fails to comply with the terms and conditions of the employer's

“reasonable written policy” governing the use and effects of drugs in the workplace, which may include blanket or probable cause testing. ORS 657.176(9)(a)(C) provides that it is a disqualifying act if the individual refuses to cooperate with or subverts or attempts to subvert a drug testing process in any employment-related test required by the employer’s reasonable written policy. 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). In the case of a positive 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).

Further development of the record is needed to establish if the employer published and communicated its drug policy to claimant or provided it to him in writing, if his initial positive urine test for drugs was confirmed by a test conducted in a federal or state licensed clinical laboratory, and if the employer followed its policy in claimant’s case or had probable cause for requiring claimant to submit to the test.

The employer’s substance abuse policy provides for “post-accident” drug testing “when an employee has been determined by [the employer] to have caused or contributed to an accident or injury, which *may include,*” certain situations or examples set out in the employer’s policy. Exhibit 1 at 3 (emphasis added). Further inquiry is needed to determine whether the employer’s testing policy provided for blanket testing or probable cause testing. It is not clear from the record whether the employer required claimant to submit to testing because he caused or contributed to an accident or injury at work,” or because the employer suspected the injury was due to claimant being under the influence of drugs. The ALJ should ask the employer if the employer requires all employees who cause or contribute to an accident to be drug tested, and if it requires all employees who are injured at work to be drug tested. Does the employer require drug testing only if the employee’s injury requires more than “first aid.” If yes, who makes that determination? When is that determination made? The ALJ should ask the employer what specific provision of its post-accident testing policy it applied to require claimant to submit to drug testing. The ALJ must ask the employer what it means by “to have caused or contributed to an accident or injury” or other provision of its policy that it used as the basis for testing claimant, and whether the employer always requires a drug test under those circumstances or if it does so only on a discretionary basis. In other words, when did the employer require an employee involved in an accident to submit to a drug test? What, in general, were the factors the employer considered to decide if an employee would be tested? What factors did the employer consider regarding claimant’s accident on September 24 to decide if claimant would be tested? In addition, based on those factors, what provision of the employer’s policy permitted it to drug test claimant? When did the employer first decide that claimant had to take a drug test? Why did the employer decide to require the test at that time, and not before that time?

The record contains the employer’s substance abuse policy and a signed form from claimant acknowledging that claimant received the employer’s employee handbook. Exhibit 1 at 1-3. The ALJ should ask the employer if the substance abuse policy in Exhibit 1 was contained in the employee handbook provided to claimant. The ALJ should also ask the employer if the initial drug test was confirmed by a test conducted in a federal or state licensed clinical laboratory. The ALJ should ask the employer if it discharged claimant because he tested positive for marijuana in violation of its policy, or

if it discharged claimant in part because claimant allegedly attempted to subvert the test. If the employer discharged claimant in part because the employer believed he attempted to subvert the test, the ALJ should ask the employer for more detail about its directions to claimant regarding the drug testing process. The ALJ should ask the parties if claimant refused to cooperate with the employer's testing process and, if yes, how. When did the employer first tell claimant he had to do a drug test? What was claimant's response? Why did the drug test not occur until September 29? The employer also presented evidence that claimant's drug test was "dilute," and alleging claimant interfered with the accuracy of the test results. Exhibit 1 at 8. The ALJ should ask the parties for additional information regarding the significance of a "positive-dilute" sample result and what evidence they have regarding the allegation that claimant diluted his specimen.

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 18-UI-100409 must be reversed, and this matter remanded for development of the record.

DECISION: Hearing Decision 18-UI-100409 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: February 28, 2018

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-100409 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.

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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