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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0719

Reversed & Remanded

PROCEDURAL HISTORY: On May 30, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant committed a disqualifying act by violating the employer's drug and alcohol policy (decision # 90700). Claimant filed a timely request for hearing. On June 26, 2018, ALJ Seideman conducted a hearing, and on June 29, 2018, issued Order No. 18-UI-112359 affirming the Department's decision. On July 19, 2018, claimant filed an application for review with the Employment Appeals Board (EAB).

With his application for review, claimant submitted written argument. Claimant's argument contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond claimant's reasonable control prevented claimant from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), we considered only information received into evidence at the hearing and claimant's argument, to the extent it was based thereon, when reaching this decision. However, because this case is being remanded to the Office of Administrative Hearings (OAH) for further proceedings, each party may send new information to OAH and the other party and offer the new information into the record at the hearing on remand, in accordance with instructions OAH will send the parties in the notice scheduling the remand hearing. At that time, the ALJ will decide if the new information is relevant and material to the issues on remand and, if so, will admit it into the record with each party having the opportunity to respond to the new information. Any party wishing to submit information for consideration by the ALJ at the remand hearing should submit the information in accordance with the instructions that will be included in the notice of hearing, and should contact OAH for further information. Any information submitted that does not comply with OAH's rules and instructions might not be considered.

CONCLUSIONS AND REASONS: Order No. 18-112359 is reversed, and this matter remanded for further proceedings consistent with this order.

Claimant was employed as a mechanic technician for the employer and was subject to the employer's drug and alcohol policy. In April of 2018, claimant was taking Adderall by prescription to treat his attention-deficit hyperactivity disorder (ADHD) and using Cannabidiol (CBD) patches and lotions without a prescription to treat his back pain. The employer's owner testified that on April 24, 2018,

claimant was administered a "random" test for drugs and alcohol and that claimant retook the test on May 1, 2018, with "similar results" – a positive test for amphetamine and marijuana. Audio Record ~ 13:00 to 14:15. Claimant testified that he was told by the employer's general manager that the second test showed that the level of marijuana in his system "actually went up." Audio Record ~ 21:00 to 22:15. On May 8, 2018, the employer discharged claimant for violating its drug and alcohol policy based on the test results. Audio Record ~ 11:00 to 14:00.

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. ORS 657.176(13)(b) defines "drug" as a controlled substance as defined in ORS 475.005.[1] "Unlawful drug" means "a drug which is unlawful for the individual to use, possess, or distribute under Oregon law. OAR 471-030-0125(2)(g) (January 11, 2018). It 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. *Id*.

An individual "tests positive" for cannabis or an unlawful drug when the test is administered in accordance with the provisions of an employer's reasonable written policy, and at the time of the test: (A) The amount of drugs or cannabis 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 cannabis present in the individual's system if the policy does not specify a cut off level. OAR 471-030-0125(2)(e). A written employer policy is reasonable if it prohibits the effects of drugs or cannabis in the workplace, does not require the employee to pay for any portion of the test, has been published and communicated to the individual or provided to the individual in writing, and when the policy provides for drug or cannabis 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). No employer policy is reasonable if the employer does not follow their own policy. OAR 471-030-0125(6).

A "random test" for drugs or cannabis, or a combination thereof, means a test for drugs or cannabis, or a combination thereof, 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). Testing for drugs or cannabis must be conducted in accordance with ORS 438.435. OAR 471-030-0125(10)(a). ORS 438.435 provides, in relevant parts, that: A clinical laboratory is authorized to perform appropriate tests on materials derived from the human body for the purpose of detecting substances of abuse in the body. All laboratories performing the tests must be licensed under the provisions of ORS 438.010 to 438.510 and must employ qualified technical personnel to perform the tests. When the specimen of a person tested for substances of abuse is submitted to the laboratory and the test result is positive, the laboratory shall

[1] ORS 475.005 defines "controlled substance" as a drug or its immediate precursor classified in Schedules I through V under the federal Controlled Substances Act, 21 U.S.C. 811 to 812, as modified under ORS 475.035, but the use of the term "precursor" is not controlled by the use of that term in ORS 475.752 to 475.980. 26 USC §812 Schedule 1 at (c)(10);ORS 475.005 (6). "Controlled substance" does not include: (A) The plant Cannabis family Cannabaceae; (B) Any part of the plant Cannabis family Cannabaceae, whether growing or not; (C) Resin extracted from any part of the plant Cannabis family Cannabaceae; (D) The seeds of the plant Cannabis family Cannabaceae; or (E) Any compound, manufacture, salt, derivative, mixture or preparation of a plant, part of a plant, resin or seed described in this paragraph.

perform a confirming test which has been designated by rule of the Oregon Health Authority (OHA) as the best available technology for use to determine whether or not the substance of abuse identified by the first test is present in the specimen prior to reporting the test results.

ORS 438.435 further provides, in relevant parts, that: The operator of a substances of abuse on-site screening facility may use substances of abuse on-site screening tests.[2] If the substances of abuse on-site screening facility obtains a positive test result on a specimen and the entity indicates that the test result is to be used to deprive any person of employment, the same specimen shall be submitted to a clinical laboratory licensed under ORS 438.110 and 438.150 or an equivalent out-of-state facility, and the presence of a substance of abuse confirmed prior to release of the on-site test result. The OHA by rule shall set standards for special category laboratories that engage only in the initial testing for substances of abuse in the body. If an initial test by a special category laboratory shows a result indicating the presence of a substance of abuse in the body, a confirmatory test shall be conducted in a licensed clinical laboratory if the results are to be used to deprive any person of any employment. If any test for substances of abuse is performed outside Oregon, the results of which are to be used to deprive any person any employment, the person desiring to use the test shall have the burden to show that the testing procedure used meets or exceeds the testing standards of Oregon.

In Order No. 18-UI-112359, the ALJ implicitly concluded, without specifically finding or concluding, that the employer's written alcohol and drug policy, under which claimant was tested was "reasonable" within the meaning of OAR 471-030-0125(6). The ALJ found that claimant's April 24, 2018 test came back positive for amphetamines and cannabis, was resubmitted for a second evaluation, "came back confirmed positive" on May 1, 2018, and that on May 8, 2018 the employer discharged claimant based on those results. Order No. 18-UI-112359 at 2. Based on those findings, the ALJ concluded that the employer discharged claimant for committing a disqualifying act under ORS 657.176(9) by using cannabis without a prescription which was a violation of the employer's policy. Order No. 18-UI-112359 at 4. However, the record, as it stands, does not support the ALJ's findings and conclusions.

The employer did not offer, and the ALJ did not elicit, sufficient information showing that the employer followed its written policy by conducting what it characterized as a "random" test of claimant for drugs and alcohol on April 24, 2018. Both the employer's owner and claimant appeared to state at hearing that claimant was administered separate tests on April 24, 2018 and May 1, 2018 and claimant was told that the test results were different. The record therefore fails to show whether or not the employer's drug and alcohol policy was "reasonable" with respect to whatever test or tests were administered, and, consequently, whether the test results, whatever they were, were confirmed and constituted a disqualifying act under ORS 657.176(9) and OAR 471-030-0125(2)(e). On remand, the employer should submit a copy of its policy in effect on and after April 24, 2018 with evidence of its receipt by claimant, as well as copies of claimant's test results on or after that date, and offer them into evidence. Regardless of whether those items are admitted into evidence, the ALJ should clarify with the employer whether the employer's drug test or tests of claimant were pursuant to a probable cause, blanket, random or periodic test, ask the employer what its policy allowed with respect to conducting that sort of drug testing, and ask any other questions necessary to determine whether or not the employer followed its written policy with respect to subjecting claimant to drug testing on or after April 24, 2018. This would include

[2] "Substances of abuse on-site screening facility" means a location where on-site tests are performed on specimens for the purpose of screening for the detection of substances of abuse. ORS 438.010(21).

clarifying with the employer whether its policy included cannabis within its list of prohibited substances and whether and how its policy defined "drugs" - legal, illegal or prescription, under federal or state law - "intoxicants" and "controlled substances." The ALJ also should clarify whether the employer discharged claimant for testing positive for amphetamine, marijuana or both, and which test or test results formed the basis for its discharge decision.

Similarly, the employer did not offer, and the ALJ did not elicit, sufficient information to determine whether the testing of claimant's urine sample or samples for drugs or cannabis were conducted in accordance with ORS 438.435. Without evidence of the laboratory or laboratories used, whether they were licensed under the provisions of ORS 438.010 to 438.510 and whether they employed qualified technical personnel to perform the tests, as well as evidence of the test results and method of testing used for any initial and confirmatory tests of the samples claimant reportedly submitted on April 24 and May 1, 2018, we cannot conclude whether claimant committed a disqualifying act. On remand, the employer should submit documentation of the laboratories used and their licensing as well as their testing methodologies for any initial and confirmatory tests conducted and offer them into evidence. Regardless of whether those items are admitted into evidence, the ALJ should clarify with the employer where the laboratories were located, how the laboratories used were licensed, and what testing methodologies were used for any initial and confirmatory tests.

Finally, claimant did not offer and the ALJ did not elicit sufficient information to determine whether the CBD product or products he used was derived from industrial hemp or cannabis plants, as industrial hemp is not cannabis. The ALJ should inquire about the specific products claimant used and what their labels stated about the source of the CBD product in question. Without that evidence, we cannot determine whether claimant's use of a CBD product that allegedly caused a positive test result constituted a disqualifying act.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That 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(5), *cf.* ORS 183.417(8). *See accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). The ALJ did not conduct a full inquiry into all issues under ORS 657.176 as implemented in OAR 471-030-0125, and absent that inquiry we cannot conclude whether the employer's policy was reasonable for purposes of ORS 657.176(9) or that the employer discharged claimant for committing a disqualifying act.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 18-112359 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

DECISION: Order No. 18-UI-112359 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: <u>August 24, 2018</u>

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to https://www.surveymonkey.com/s/5WQXNJH. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.