

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0563

Reversed & Remanded

PROCEDURAL HISTORY: On May 2, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant but not for a disqualifying act (decision # 152530). The employer filed a timely request for hearing. On June 5, 2019, ALJ Shoemake conducted a hearing, and on June 11, 2019 issued Order No. 19-UI-131380, affirming the Department's decision. On June 20, 2019, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument that contained additional evidence in the form of reports about the drug, cannabis, and alcohol test that was administered to claimant on March 26, 2019. EAB did not consider the additional evidence. Because we have remanded this matter for additional evidence, the employer may offer this new information at the remand hearing and it will be admitted into evidence if it is relevant to the issues on which this matter had been remanded. To ensure that this information may be considered for admission into evidence, the employer should follow the instructions on the notice scheduling the remand hearing as to documents a party wishes to be considered at the hearing. Those instructions include that copies of the documents must be provided to all parties and the ALJ at the addresses listed on the certificate of mailing prior to the date of the scheduled hearing.

FINDINGS OF FACT: (1) Hoffman Construction Company of Oregon employed claimant to perform purchasing from March 18, 2019 until March 28, 2019.

(2) The employer had written policy to control the effects of drugs, cannabis, and alcohol in the workplace. The employer's policy provided for pre-employment drug, cannabis, and alcohol testing and stated that a positive test result would cause the employer to withdraw any offer of employment. The policy further provided that an employee was prohibited from having a level of THC (marijuana) in their system of 50 ng/ml during an initial screen and 15 ng/ml during a confirmatory test. The employer gave a copy of the policy to claimant on March 18, 2019.

(3) On March 18, 2019, the employer required claimant to submit to a pre-employment drug screen. Claimant gave a urine specimen at a collection facility and the specimen was forwarded to a licensed

and certified laboratory for evaluation. The employer allowed claimant to perform work contingent on passing the drug test.

(4) On March 26, 2019, the laboratory notified the employer that the specimen claimant had provided on March 18 appeared to have been adulterated or tampered with and would not be evaluated. On that day, the employer required claimant to submit to a second test. Claimant gave a urine specimen and, as before, that specimen was sent to the same licensed and certified laboratory for evaluation. The laboratory determined on initial testing that claimant's urine specimen had a level of THC (marijuana) that exceeded the employer's cutoff level of 50 ng/ml. The laboratory performed a second confirmatory test on the specimen that claimant had provided and determined that it had a level of THC (marijuana) that exceeded the employer's confirmatory cut off level of 15 ng/ml.

(5) On March 28, 2019, the employer discharged claimant for having failed the pre-employment drug, cannabis, and alcohol test.

CONCLUSIONS AND REASON: This matter must be remanded for additional evidence to determine if the employer discharged claimant for committing a disqualifying act.

ORS 657.176(2)(h) requires a disqualification from unemployment insurance benefits if the individual has committed a disqualifying act. ORS 657.176(9)(a) provides that an individual is considered to have committed a disqualifying act when the individual:

(B) Fails or refuses to take a drug, cannabis or alcohol test as required by the employer's reasonable written policy:

(F) Tests positive for alcohol, cannabis or an unlawful drug in connection with employment[.]

OAR 471-030-0125 (January 11, 2018) states:

(2) Definitions. For purposes of this rule:

(b) For purposes of ORS 657.176(9), an individual "fails or refuses to take" a drug, cannabis, or alcohol test when the individual does not take the test as directed by the employer in accordance with the provisions of an employer's reasonable written policy or collective bargaining agreement.

(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.

(f) An individual fails a test for alcohol, cannabis, or unlawful drugs when the individual tests positive as described in subsection (e) of this section.

(10) For the purposes of ORS 657.176(9) and (10):

(a) Testing for drugs, cannabis, or alcohol must be conducted in accordance with ORS 438.435.

ORS 438.435 provides in part:

(3) When the specimen of a person tested for substances of abuse is submitted to a laboratory and the test result is positive, the laboratory shall perform a confirming test which has been designated by rule of the Oregon Health Authority 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.

Order No 19-UI-131380 concluded that claimant was not disqualified from benefits because the employer did not show that she committed a disqualifying act. The order reasoned that the positive result from the second drug test that claimant took on March 26 could not be considered because the employer did not show that a second confirmatory test was performed on the initially tested specimen as required by ORS 438.435. Order No. 19-UI-131380 at 4.

The record shows that the employer's counsel testified at the hearing that that the laboratory did an initial cutoff test on the March 26 specimen and did a second test on that specimen, which confirmed that claimant had failed the test. Transcript at 13-14. The counsel's testimony on the issue of testing was unequivocal and certain. On this record, that evidence was sufficient to show that both an initial and a confirmatory test were performed on the specimen that claimant submitted on March 26.

However, additional information is required in order to determine whether the positive result for THC on the March 26 test may be considered to disqualify claimant from benefits. Because the employer's drug test administrator was a hearing witness, the employer's other witness, its counsel, stated that questions about testing should be directed to the administrator; however, that witness was not examined about the confirmatory testing and remand is necessary to allow the employer the opportunity to present evidence and for claimant to respond.

OAR 333-024-0345 (November 3, 2000) is the rule that applies to confirmation testing. It states in part:

(1) When the substances of abuse screening laboratory obtains a positive test result and the submitter indicates the result is to be used to deprive or deny any person any employment or any benefit, that same specimen must be submitted and confirmed prior to the release of the screening results. When performed within the State of Oregon, the confirmatory testing shall be by a clinical laboratory licensed under ORS 438.110 and 438.150 or certified under the Clinical Laboratory Improvement Amendments of 1988, Public Law 100-578, 42 U.S.C. 201 and 263a for that testing. The confirmatory testing shall be as described in section (4) of this rule.

(4) The following methods of chemical analysis to determine substances of abuse have been approved:

- (a) Chromatography;
- (b) Immunoassay;
- (c) Spectroscopy;
- (d) Mass spectroscopy.

(5) The confirmatory test shall be performed by a different analytical method from that used for the initial screening test.

To determine if the March 26 test result that was positive for THC may be considered to disqualify claimant from benefits, the record must be developed as to what method of chemical analysis the laboratory used in the confirmatory test and whether that method was one of the approved methods set out in OAR 333-024-0345(4). The record must also be developed to determine whether different analytical methods were used in the initial test and confirmatory tests performed on the March 26 specimen as required by OAR 333-024-0345(5).

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 was discharged for a disqualifying act, Hearing Order 19-UI-131380 is reversed, and this matter remanded for further development of the record.

DECISION: Order No. 19-UI-131380 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 25, 2019

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-131380 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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