

**BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319**

PATRICIA L JOHNSON

Claimant

and

KWIK TRIP INC

Employer

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HEARING NUMBER: 16B-UI-10732

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT IS FILED WITHIN 30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A

DECISION

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Employer appealed this case to the Employment Appeal Board. All members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds the administrative law judge's decision is correct. With the following modification, the administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED** with the following **MODIFICATION**:

To the extent that the Administrative Law Judge suggests that strict compliance with Iowa Code §730.5 is required, we disagree. The Court has ruled “if the employer's actions fall short of strict compliance, but nonetheless accomplish the important objective of providing notice to the employee of the positive test result and a meaningful opportunity to consider whether to undertake a confirmatory test, the employer's conduct will substantially comply with the statute.” *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009). At the same time the Court in that case described substantial compliance as “compliance in respect to essential matters necessary to assure the reasonable objectives of the statute” and then described those objectives for Iowa Code §730.5:

Section 730.5(7)(i)(1) accomplishes this protective purpose by mandating written notice by certified mail of (1) any positive drug test, (2) the employee's right to obtain a confirmatory test, and (3) the fee payable by the employee to the employer for reimbursement of the expense of the test. Iowa Code § 730.5(7)(i)(1).

Id. Here the evidence fails to establish compliance with the third objective. The record does indeed show that the Employer *sent* the letter by certified mail, and we think actual receipt is not a requirement. But the record fails to establish that the notice informed the employee of the “fee payable.” This is an express requirement of the statute. “[T]he employer shall notify the employee in writing by certified mail, return receipt requested, of ...the fee payable by the employee to the employer for reimbursement of expenses concerning the test.” Iowa Code §730.5(7)(i)(1). This is no minor requirement, as is shown here by the fact that the Claimant refused the retest citing the expense. Indeed, this is the reason why the Claimant in *Sims* rejected the test, and is part of the reason why that notice was flawed. *See also Skipton v. S & J Tube*, No. 11-1902, slip op. at 8 (Iowa App. 9/9/2012)(finding lack of compliance in part because “the notice given to Skipton by the employer did not convey any information regarding the cost of a confirmatory test.”) This failure to give any information on the cost of the confirmatory test, regardless of the other flaws cited by the Administrative Law Judge, would alone make us conclude that the Employer failed to prove substantial compliance with Iowa Code §730.5. Without knowledge of the fee to be charged, a worker cannot make an informed determination of whether a retest is feasible. We thus exclude the test results from evidence, as did the Administrative Law Judge, and find misconduct has not been proven.

The Employer submitted additional evidence to the Board which was not contained in the administrative file and which was not submitted to the administrative law judge. While the additional evidence was reviewed for the purposes of determining whether admission of the evidence was warranted despite it not being presented at hearing, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today’s decision. There is no sufficient cause why the new and additional information submitted by the Employer was not presented at hearing. Accordingly none of the new and additional information submitted has been relied upon in making our decision, and none of it has received any weight whatsoever, but rather all of it has been wholly disregarded.

Ashley R. Koopmans

James M. Strohman

DISSENTING OPINION OF KIM D. SCHMETT:

I respectfully dissent from the majority decision of the Employment Appeal Board. After careful review of the record, I would remand this matter for further development of the record. After review of the record and the Administrative Law Judge's decision, I conclude that the Administrative Law Judge did not satisfy her duty to adequately develop the record on the issues surrounding the Employer's compliance with Iowa Code §730.5. I would for this reason remand the case.

Kim D. Schmett

RRA/fnv