

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

BRIAN J BERGMANN

Claimant

and

BUILDING PRODUCTS INC OF IOWA

Employer

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HEARING NUMBER: 15B-UI-06535

**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. Two members of the Employment Appeal Board reviewed the entire record. With the following modification, the majority members of the Appeal Board find the administrative law judge's decision is correct. 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**:

The Employment Appeal Board adopts the Administrative Law Judge's decision as its own but adds the following discussion to the Reasoning and Conclusions of Law:

The Employer asserts that by testing all employees in a single location, or indeed throughout all its locations in the state, the Employer has complied with §730.5. The Employer, unfortunately, has misread the wording of the law.

An employee in Iowa may be subjected to a mandatory drug test only upon certain specified conditions. The only permitted testing is set out by law:

8. Drug or alcohol testing. Employers may conduct drug or alcohol testing as provided in this subsection:

a. Employers may conduct **unannounced drug or alcohol testing** of employees who are **selected from** any of the following **pools** of employees:

(1) The entire employee population at a particular work site of the employer except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is conducted because of the status of the employees or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

(2) The entire full-time active employee population at a particular work site except for employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted because of the status of the employee or who have been excused from work pursuant to the employer's working policy.

(3) All employees at a particular work site who are in a pool of employees in a safety-sensitive position and who are scheduled to be at work at the time testing is conducted, other than employees not subject to testing pursuant to a collective bargaining agreement, or employees who are not scheduled to be at work at the time the testing is to be conducted or who have been excused from work pursuant to the employer's work policy prior to the time the testing is announced to employees.

b. Employers may conduct drug or alcohol testing of employees during, and after completion of, drug or alcohol rehabilitation.

c. Employers may conduct reasonable suspicion drug or alcohol testing.

d. Employers may conduct drug or alcohol testing of prospective employees.

e. Employers may conduct drug or alcohol testing as required by federal law or regulation or by law enforcement.

f. Employers may conduct drug or alcohol testing in investigating accidents in the workplace in which the accident resulted in an injury to a person for which injury, if suffered by an employee, a record or report could be required under chapter 88, or resulted in damage to property, including to equipment, in an amount reasonably estimated at the time of the accident to exceed one thousand dollars.

The Employer relies on random testing. The Code does not provide for "random testing" so named but does provide for "unannounced drug or alcohol testing" and this is the type of testing that is authorized by 730.5(8)(a). That term is defined by earlier in Code section 750.5:

1. Definitions. As used in this section, unless the context otherwise requires:

...

ℓ. "Unannounced drug or alcohol testing" means testing for the purposes of detecting drugs or alcohol which is conducted on a periodic basis, without advance notice of the test to employees, other than employees whose duties include responsibility for administration of the employer's drug or alcohol testing program, subject to testing prior

to the day of testing, and without individualized suspicion. The **selection of employees** to be tested from the pool of employees subject to testing **shall** be done based on a **neutral and objective selection process by an entity independent from the employer and shall be made by a computer-based random number generator** that is matched with employees' social security numbers, payroll identification numbers, or other comparable identifying numbers in which each member of the employee population subject to testing has an equal chance of selection for initial testing, regardless of whether the employee has been selected or tested previously. The random selection process **shall be conducted through a computer program** that records each selection attempt by date, time, and employee number.

Iowa Code §730.5(1)(*ℓ*). So the Code states that a random number generator, to extent that such a thing exists, must be used by an independent entity to “select” those to be tested from “the pool of employees subject to testing...” *Id.* Then in Iowa Code §730.5(8)(a) the Code authorizes “unannounced drug or alcohol testing” of “employees who are selected from any of the following pools of employees...” Iowa Code §730.5(8)(a). These provisions make clear that certain pools are subjected to a random “selection” process implemented by an independent entity. Obviously just picking everyone is not “random” and does not meet this requirement. The Administrative Law Judge was entirely correct, and the Employer has unfortunately misread the statute. The Employer, overlooking Iowa Code §730.5(1)(“1”), has confused the pool from which the random employees are to be *chosen for testing* with the subset of employees *who are to be tested*. The Code just does not say you can test everyone all at the same time. After all, what would be the point of such carefully crafted limitations if the Employer can just test everyone anytime it likes?

We do sympathize with the Employer on this in that it has fallen victim to what is known in law as a “stuffed definition.” The drafters of §730.5 have placed substantive provisions in a definition, something too often done in laws. This makes it hard sometimes for those unfamiliar with the provisions at issue to find all the requirements. But nevertheless, they are clearly there, and the Administrative Law Judge was correct that this drug test was not authorized.

Finally, solely for the edification of the parties, we note that “[a] finding of fact or law, judgment, conclusion, or final order made pursuant to this section by an employee or representative of the department, administrative law judge, or the employment appeal board, is binding only upon the parties to proceedings brought under this chapter, and is not binding upon any other proceedings or action involving the same facts brought by the same or related parties before the division of labor services, division of workers' compensation, other state agency, arbitrator, court, or judge of this state or the United States.” Iowa Code §96.6(4)(emphasis added). This provision makes clear that unemployment findings and conclusions are only binding on unemployment issues, and have no effect otherwise.

Kim D. Schmett