

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

RENEE A DUGAN

Claimant,

and

DELAVAN INC

Employer.

HEARING NUMBER: 07B-UI-09890

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. The members of the Employment Appeal Board, one member dissenting, reviewed the entire record. The Appeal Board finds 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**.

Elizabeth L. Seiser

John A. Peno

DISSENTING OPINION OF MARY ANN SPICER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. What seems to be the issue is the Reasoning and Conclusions of the Administrative Law Judge. Here the administrative law judge states at p.4 of the decision, "... that the evidence indicates that at this time the employer requested the sample on September 6, the employer did not discuss with Ms. Dugan the consequences to her employment if the sample tested positive." The employer was not allowed an opportunity to refute this statement, which was contradictory to what the claimant testified at the hearing. Ms. Dugan stated that she was told that if she failed the drug test, she would be immediately terminated. (Tr. 18, lines 26-28)

The claimant was aware that her job would be in jeopardy based on her testimony that she was familiar with the drug policy, which she signed on September 6, 2006. (Tr. 8, line 29) Ms. Dugan admits that she received a certified letter with a return receipt from the employer. (Tr. 19, lines 32 – 34; Tr. 20, lines 1– 2) A reasonable person would surmise that Ms. Dugan knew that the employer was trying to contact her by both her home and cell phones. Yet, she failed to answer the call. On the day of discharge, the employer contacted her, again, using the same number to answer her questions on the split sample. (Tr. 20, lines 31– 34)

At issue is both the medical review officer's (MRO's) and the employer's credibility as to whether reasonable efforts were made for the employee to contact the MRO's office to discuss the results with the MRO who had been unsuccessful in trying to reach Ms Dugan. See, DOT Federal Regulation 382.411 (b).

§382.411 Employer notifications provides:

(a) An employer shall notify a driver of the results of a pre-employment controlled substances test conducted under this part, if the driver requests such results within 60 calendar days of being notified of the disposition of the employment application. An employer shall notify a driver of the results of random, reasonable suspicion and post-accident tests for controlled substances conducted under this part if the test results are verified positive. The employer shall also inform the driver which controlled substance or substances were verified as positive.

(b) The designated employer representative shall make reasonable efforts to contact and request each driver who submitted a specimen under the employer's program, regardless of the driver's employment status, to contact and discuss the results of the controlled substances test with a medical review officer who has been unable to contact the driver.

(c) The designated employer representative shall immediately notify the medical review officer that the driver has been notified to contact the medical review officer within 72 hours.

In review of the evidence submitted, this board member concludes that the employer's testimony carried more credibility as to whether there was reasonable compliance in notifying Ms. Dugan of the test results. Furthermore, I would also conclude that there was reasonable delay due to the claimant's failure to retrieve her certified letter nor answer initial phone calls. For all the foregoing reasons, I would reverse ALJ and deny benefits.

Mary Ann Spicer

AMG/kjo