

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

RUACH C DENG

Claimant

and

CAPTIVE PLASTICS LLC

Employer

HEARING NUMBER: 19BUI-05128

**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, 96.6-2

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:**

The Board makes the following findings of fact:

In order to select the names to be tested, the Employer supplied its employee roster to Jennifer Canare. Ms. Canare, who is located in New Jersey, generated the roster and then "just randomly picked five individuals by hand." (Recording at 1:09-1:10). The Employer's policy requires that in Iowa the random list must be by "computer-generated neutral selection procedure." (Ex. 5).

The Board adds the following legal analysis:

Iowa Code §730.5(8) states that "Employers may conduct drug or alcohol testing as provided in this subsection: Employers may conduct unannounced drug or alcohol testing of employees..." The definitions subsection of §730.5 defines "'Unannounced drug or alcohol testing" and includes in that definition that:

05128

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.

Iowa Code §730.5(1)"I". As we have found, the employer's policy similarly requires the use of a computer-based selection procedure. Substantial compliance with Iowa Code §730.5 is all that is required. *Sims v. NCI Holding Corp.*, 759 N.W.2d 333 (Iowa 2009). "Substantial compliance is said to be compliance in respect to essential matters necessary to assure the reasonable objectives of the statute." *Sims v. NCI Holding Corp.*, 759 N.W.2d 333, 338 (Iowa 2009)(quoting *Superior/Ideal, Inc. v. Bd. of Review*, 419 N.W.2d 405, 407 (Iowa 1988)). The reasonable objectives of an explicit requirement of using a computerized random number generator are obviously that computers cannot be influenced either consciously or subconsciously by human bias, or imprecision. For example, the computer does not care if a worker's name seems familiar because the worker had been tested before, or if the names selected seem "too close together," or if someone's name seems "foreign" or if it is too much trouble to review the whole list for every selection. We do not suggest any such short-cut taking, unconscious bias, or predilection, actually played a role in this case. But we do think the whole point of specifically requiring a computer-based selection procedure is to avoid the *possibility* of such human frailties affecting the selection. *C.f. State v. Plain*, 898 N.W.2d 801, 831-33 (Iowa 2017). We find that use of "hand selection" entirely undermines the statutory goal of assuring random selection is truly random, and a process of conducting "unannounced drug or alcohol testing" that relies on hand-selection does not substantially comply with the statutory mandate. For this reason alone, as well as in conjunction with those identified by the Administrative Law Judge, we find that the testing procedure was not in substantial compliance with Iowa Code §730.5 and that any irregularities in the Claimant's sample which was produced as a result of that procedure may not be considered to be evidence of misconduct. The Employer has thus failed to prove the Claimant was discharged for misconduct and we affirm the Administrative Law Judge.

Ashley R. Koopmans

James M. Strohman

05128

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 reverse the decision of the administrative law judge. I find that the Employer did substantially comply with the statutory requirements, and that any deviation was not relevant since the Claimant's tampering with the specimen constitutes misconduct. In particular, I would find that the Code does not require periodic training of *every* supervisor, and that the Employer did in fact maintain the required training for supervisory employees. Also the failure to provide the list of drugs to be tested did not substantially affect the Claimant's actions in providing an altered sample.

Kim D. Schmett

RRA/fnv

DATED AND MAILED: _____