

STATE OF MICHIGAN
MICHIGAN COMPENSATION APPELLATE COMMISSION

In the Matter of

PEDRO MENDOZA,

Appeal Docket No.: 17-004211-252718W

Claimant,

Social Security No.: XXX-XX-1028

AEROTEK INCORPORATED,

Employer.

DECISION OF THE MICHIGAN COMPENSATION APPELLATE COMMISSION

This case is before the Michigan Compensation Appellate Commission (Commission) pursuant to the claimant's timely appeal from a March 20, 2017 decision by an Administrative Law Judge (ALJ). The ALJ's decision affirmed a February 1, 2017 Unemployment Insurance Agency (Agency) redetermination and held the claimant disqualified for benefits under the illegal drug provision of the Michigan Employment Security Act¹ (Act), Section 29(1)(m). Having reviewed the record, we reverse the ALJ's decision. Our reasons are as follows.

Section 29(1)(m) of the Act provides:

Was discharged for illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; refusing to submit to a drug test that was required to be administered in a nondiscriminatory manner; or testing positive on a drug test, if the test was administered in a nondiscriminatory manner. If the worker disputes the result of the testing, and if a generally accepted confirmatory test has not been administered on the same sample previously tested, then a generally accepted confirmatory test shall be administered on that sample. If the confirmatory test also indicates a positive result for the presence of a controlled substance, the worker who is discharged as a result of the test result will be disqualified under this subdivision. A report by a drug testing facility showing a positive result for the presence of a controlled substance is conclusive unless there is substantial evidence to the contrary. As used in this subdivision and subdivision (e):

(i) "Controlled substance" means that term as defined in section 7104 of the public health code, 1978 PA 368, MCL 333.7104.

(ii) "Drug test" means a test designed to detect the illegal use of a controlled substance.

(iii) "Nondiscriminatory manner" means administered impartially and objectively in accordance with a collective bargaining agreement, rule, policy, a verbal or written notice, or a labor-management contract.

¹ MCL 421.1 et seq.

In order for a claimant to be disqualified under Section 29(1)(m) of the Act, the employer has to present sufficient evidence to establish that the claimant was discharged for either (1) illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer; (2) refusing to submit to a valid drug test; or (3) testing positive on a valid drug test.

The only people present at the March 15, 2017 hearing before the ALJ were the ALJ and the claimant's attorneys. Because the employer failed to appear and present evidence, it presented no evidence and so failed to meet its burden of proving that the claimant was terminated from employment for a disqualifying reason under Section 29(1)(m) of the Act.

The claimant had no burden of proof in this case. The claimant merely had the obligation to prosecute its appeal. This obligation of the claimant was met by appearing at the hearing through his attorneys and asserting through them that it was the employer's burden to prove disqualification under Section 29(1)(M) of the Act. *Ashford v Unemployment Compensation Commission*, 328 Mich 428, 433 (1950). The discussion by the ALJ in her opinion of presumptions she would be required to indulge in for the claimant to prevail is, for that reason, misplaced. The question of whether the claimant was employed by this employer was not in dispute per the Notice of Hearing, nor was occurrence of an employment separation. The Notice of Hearing identified the issue before the ALJ as one as to which the burden of proof rested with the employer. Absent participation by the employer to place that burden allocation into controversy, again no resort to a presumption was required.

While the Agency Determination and Redetermination were not in evidence in this case, and do not by their existence prove the truth of their contents in any event, they did, along with the Notice of Hearing, serve to apprise the ALJ and any party present of the issue(s) presented, namely disqualification under Section 29(1)(m) of the Act. *Ashford, supra*. The parties were apprised of the issue by the Agency determination and redetermination and the employer, which has the burden of proof in cases under Section 29(1)(m), elected not to appear in person or through counsel or other representative. Thus, a prima facie showing to support the conclusion of the Agency expressed in the Determination and Redetermination was not presented and the correct course for the ALJ in light of *Ashford* was to reverse the Agency and find the claimant not disqualified. She chose instead to affirm the unproven adjudication(s) reached by the Agency and so must be reversed.

The Commission received a timely request from the claimant to present oral argument, as well as permission to submit written argument, in this matter. We read and considered the requests and conclude neither is necessary for us to reach a decision. The requests are denied.

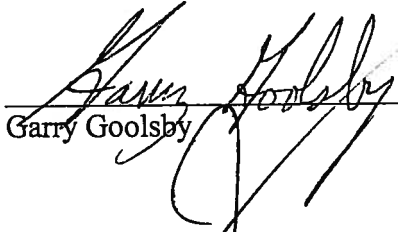
Therefore,

IT IS ORDERED that the ALJ's March 20, 2017 decision is reversed.

IT IS FURTHER ORDERED that the claimant is not disqualified for benefits under the illegal drug provision of the Act, Section 29(1)(m).

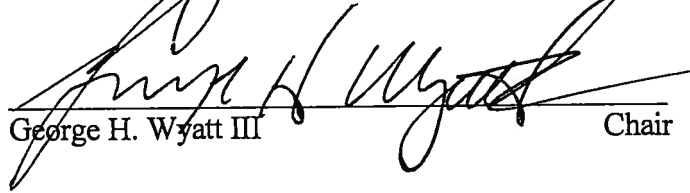
IT IS FURTHER ORDERED that the claimant may receive benefits if otherwise eligible and qualified.

This matter is referred to the Agency for action consistent with this decision.



Garry Goolsby Commissioner

Jack F. Wheatley Commissioner



George H. Wyatt III Chair

MAILED AT LANSING, MICHIGAN AUG 18 2017

This decision shall be final unless EITHER (1) the Michigan Compensation Appellate Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

SEP 18 2017
TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.