STATE OF FLORIDA
REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

In the matter of:

Claimant/Appellant

R.A.A.C. Docket No. 19-02270

vs.

Referee Decision No. 0035823719-03U

Employer/Appellee

Initial Determination No. 0035823719-01

ORDER OF REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

This case comes before the Commission upon its exercise of original jurisdiction pursuant to Section 443.151(4)(c), Florida Statutes, for disposition of a determination issued by the Department of Economic Opportunity (DEO) that held the claimant disqualified from benefits and the employer's account noncharged.[1] Benefits were denied on the statutory ground that the claimant was discharged for misconduct. §443.101(1)(a), Fla. Stat. After careful consideration of the evidence and the law, we affirm.

I.
Issue

The issue before the Commission is whether the claimant was discharged by the employer for misconduct connected with work as provided in Section 443.101(1)(a), Florida Statutes. As grounds for misconduct, the employer asserts the claimant violated its drug and alcohol testing policy when he tested positive for cocaine metabolite on an employer-directed drug test governed by the drug testing procedures and regulations of the Department of Transportation (DOT) and the Federal Motor Carrier Safety Administration (FMCSA).

[1] An appeals referee with DEO's Office of Appeals had initial jurisdiction over the claimant's appeal of the determination. Following a hearing in the matter, the referee reversed the initial determination in favor of the claimant. However, by taking original jurisdiction over the case, the Commission vacated the referee's decision and, in doing so, reinstated the determination, which is now the agency action under review.

II.
Procedural Background

A. Proceedings Before DEO

The claimant filed a claim for reemployment assistance benefits on May 7, 2019. On May 31, 2019, DEO issued the initial determination under appeal, Issue Identification No. 0035 8237 19-01. The determination held the claimant disqualified from receipt of benefits because he was discharged from his employment for misconduct. The determination further held the employer's account was noncharged. The claimant timely appealed the determination.

The case was noticed for a hearing before an appeals referee to be held on June 17, 2019. The claimant failed to appear for the hearing as scheduled. Consequently, the appeals referee dismissed the case on the ground the claimant failed to prosecute the appeal. The claimant filed a timely request to reopen the case.

Following the claimant's request, the case was noticed for a hearing to be held on July 11, 2019. The threshold issue noticed was whether the referee had jurisdiction over the case following the claimant's nonappearance at the previously scheduled hearing.

The hearing commenced and concluded as scheduled. At the hearing, the employer's director of safety and risk management represented the employer and presented testimony on the employer's behalf. The claimant presented testimony on his own behalf. The referee admitted the following documents into the evidentiary record: the employer's controlled substance and alcohol policy; the claimant's signed acknowledgement of receipt of the employer's Handbook and Orientation Notebook and the FMCSA Regulations Pocketbook; a letter verifying that Dr. T. D. is certified as a Medical Review Officer (MRO) through the American Association of Medical Review Officers; and Dr. D.'s report of the claimant's laboratory results of the DOT controlled substance test of April 29, 2019.

Following the hearing, the referee issued Referee Decision No. 0035 8237 19-03 (July 15, 2019). In the decision, the referee first ruled that jurisdiction was established, finding the claimant had good cause for not appearing at the first scheduled hearing. Fla. Admin. Code R. 73B-20.017(4). As to the merits, the referee concluded the employer's evidence was legally insufficient to establish misconduct under the reemployment assistance law. Consequently, the referee reversed the initial determination. The employer timely appealed the decision to the Commission.

B. Proceedings Before the Commission

After reviewing the record and appellate arguments, the Commission vacated the referee's decision and took original jurisdiction over the merits issue. R.A.A.C. Docket No. 19-01412 (December 18, 2019). The Commission upheld the referee's ruling on jurisdiction. *Id.*

On February 12, 2020, the Commission held a supplemental hearing. The employer's director of safety and risk management again represented the employer and presented testimony on the employer's behalf. Dr. T. D. (MRO for MediTest) and Ms. C. G. (Director of Operations for MediTest) also presented testimony for the employer. The claimant presented testimony on his own behalf. The Commission moved into evidence the following documents: an MRO verification worksheet completed by Dr. D.; the final drug testing report of the claimant; the MRO copy of the federal drug testing custody and control form (CCF); and the test facility copy of the CCF.

III.
Findings of Fact

The claimant began working for the employer as a commercial truck driver on November 10, 2011. In this capacity, the claimant was required to hold a valid Class A commercial driver's license.

The employer maintains a controlled substance and alcohol policy that broadly incorporates the drug testing procedures and regulations of the DOT and FMCSA. The policy prohibits any controlled substance among its drivers, "except when administered to a driver by, or under the instruction of, a licensed medical practitioner, who has advised the driver that the substance will not affect the driver's ability to safely operate a commercial motor vehicle." The claimant received the policy on November 8, 2011.

On April 29, 2019, the claimant took a random, employer-directed drug test, which was governed by the drug testing procedures of the DOT. The claimant submitted the urine specimen at MediTest, an occupational health clinic that maintains an office on-site at the employer's location.

Ms. G., who is certified by the FMCSA and the Substance Abuse and Mental Health Services Administration (SAMHSA) to perform DOT collections, collected the specimen. Ms. G. completed and signed a federal drug testing CCF, certifying that the specimen was collected, labeled, and sealed in accordance with federal requirements. Ms. G. sent the specimen to Quest Diagnostics in Tucker, Georgia for testing. The Quest Diagnostics location is a Department of Health and Human Services (HHS)-certified laboratory certified to perform urine drug testing.[2]

The laboratory's technician/scientist certified on the CCF that the specimen was examined; handled using chain of custody procedures; analyzed; and reported in accordance with applicable federal requirements. The test of the claimant's urine sample revealed the presence of cocaine metabolite in excess of the DOT threshold. The laboratory forwarded the positive test results to Dr. D., who is a certified MRO by the American Association of Medical Review Officers and was the acting MRO for MediTest.

Dr. D. completed the MRO portion of the CCF and verified the urinalysis results in accordance with the federal requirements. On May 6, 2019, Dr. D. contacted the claimant to discuss the positive result. During their conversation, the claimant identified his prescribed medications: Lisinopril, Clonidine, and Aldadctone, which Dr. D. recorded in his MRO verification worksheet. Dr. D. determined that none of the mentioned medications would give a false confirmed positive for cocaine metabolite. The claimant told Dr. D. that he has "never done a drug in [his] life." The claimant did not provide an explanation to Dr. D. for his positive drug test result. Nor did he ask for the split sample to be tested after Dr. D. explained the procedure for requesting it.[3]

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[2] The Commission takes official notice of the Department of Health and Human Services, Substance Abuse and Mental Health Services Administration; HHS-Certified Laboratories, Certified to Conduct Urine Drug Testing, 85 Fed. Reg. 12310 ,12311-12 (March 2, 2020), available at https://www.samhsa.gov/sites/default/files/certified-laboratories-and-iitfs-frn-03012020.pdf. (Last accessed April 27, 2020.)

[3] The DOT drug testing program operates a split-specimen collection system. 49 C.F.R. § 40.71. That is, "a part of the urine specimen [ ] is sent to a first laboratory and is retained unopened, and [ ] is transported to a second laboratory in the event that the employee requests that it be tested following a verified positive test of the primary specimen." *Id.* at § 40.3. An employee has 72 hours after notification of the verified positive test to trigger the split-specimen procedures. *Id.* at § 40.171(a).

Later that day, the employer's director of safety and risk management questioned the claimant about the positive drug test result. The claimant reiterated that he has never used cocaine but, again, did not offer any explanation as to how he tested positive for it. Following the conversation, the director of safety and risk management discharged the claimant on May 6, 2019, because of his failed DOT drug test, in violation of the employer's controlled substance and alcohol policy.

IV.
Analysis

A. Misconduct

In the reemployment assistance law, workers who are discharged for misconduct connected with work are disqualified from receiving reemployment assistance benefits. § 443.101(1)(a), Fla. Stat. As relevant here, Section 443.036(29), Florida Statutes, defines misconduct as:

> (a) Conduct demonstrating a conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee.
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> (e) 1. A violation of an employer's rule, unless the claimant can demonstrate that:
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> a. He or she did not know, and could not reasonably know, of the rule's requirements;
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> b. The rule is not lawful or not reasonably related to the job environment and performance; or
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> c. The rule is not fairly or consistently enforced.

Another provision at issue is Section 443.101(1)(d), Florida Statutes, which disqualifies an individual from benefits "[f]or any week with respect to which the department finds that his or her unemployment is due to a discharge for misconduct connected with the individual's work, consisting of drug use, as evidenced by a positive, confirmed drug test."

The employer has the initial burden to establish misconduct. *Mid-Fla. Freezer Warehouses, Ltd. v. Unemployment Appeals Commission,* 41 So. 3d 1014, 1020 (Fla. 5th DCA 2010). The proof must be by a preponderance of competent, substantial evidence. *Tallahassee Housing Authority v. Unemployment Appeals Commission,* 483 So. 2d 413, 414 (Fla. 1986).

If established, the burden shifts to the claimant to show the propriety of his actions. *Alterman Transport Lines, Inc. v. Unemployment Appeals Commission*, 410 So. 2d 568, 569 (Fla. 1st DCA 1982). In cases where an employer establishes a rule violation under subparagraph (e)1., the claimant bears the burden to show the applicability of one of the provision's three enumerated defenses. *Critical Intervention Servs. v. Reemployment Assistance Appeals Commission*, 106 So. 3d 63, 66 (Fla. 1st DCA 2013); *Crespo v. Reemployment Assistance Appeals Commission*, 128 So. 3d 49 (Fla. 3d DCA 2012).

To evaluate whether the employer met its initial burden here, we first discuss DOT's chain of custody and reporting procedures; we then set forth the applicable evidentiary standards in reemployment assistance proceedings; and, finally, we address how those evidentiary standards apply to the employer's evidence regarding the chain of custody procedures and reported test results in this case.

B. The DOT Drug Testing Program

As a commercial truck driver, the claimant is subject to the DOT drug testing procedures set forth in 49 C.F.R. Part 40 (Part 40) pursuant to the regulations of the FMCSA. *See* 49 C.F.R. §§ 382.103 & 105.

Lab-based urinalysis is *currently* the only accepted drug-testing modality for screening covered DOT employees.[4] Under Part 40, an employee's urine sample is obtained at a federally-approved collection site. *Id.* at § 40.41. After the sample is obtained, the collector ships the specimen to the lab for analysis. *Id.* at § 40.73(c). The lab will then analyze the results and, in turn, report them to the MRO. *Id.* at § 40.81-97. The MRO confirms the results, reviews the CCF, determines whether there is a legitimate medical explanation for a confirmed positive test by interviewing the donor, and reports the verified results to the employer. *Id.* at §§ 40.123 & 163.

[4] In addition to the long-standing methodology of urine testing, on October 25, 2019, the HHS and SAMHSA published its final Mandatory Guidelines for Workplace Drug Testing Programs Using Oral Fluid, which permits oral fluid testing as an alternative, permissible drug-testing modality for federal employees. *See* Department of Health and Human Services, Substance Abuse and Mental Health Services Administration; Mandatory Guidelines for Federal Workplace Drug Testing Programs – Oral/Fluid, 84 Fed. Reg. 57554 (October 25, 2019), available at https://www.govinfo.gov/content/pkg/ FR-2019-10-25/pdf/2019-22684.pdf. (Last accessed April 27, 2020.) The Omnibus Transportation Employee Testing Act mandates the DOT and DOT-agencies to follow the HHS requirements for testing protocols. Thus, it is anticipated the DOT will move towards adopting oral fluid testing. To do so, however, the DOT will first engage in separate rule-making.

The regulations set forth comprehensive procedures to ensure the authenticity and integrity of the specimen samples throughout the process. These include specific chain of custody procedures intended to document and control handling of the urine specimen from the time the employee gives the specimen to the collector until the specimen is destroyed. *Id.* at § 40.3. In general, Part 40 deals with chain of custody in two contexts: (1) at the collection site and (2) after the sample's receipt by the lab.

DOT chain of custody procedures use the federal drug testing CCF, which contains five parts or "copies": Copy 1 (the Test Facility), Copy 2 (the MRO), Copy 3 (the Collector), Copy 4 (the Employer), and Copy 5 (the Donor). *Id.* at § 40.45(a).[5] Upon shipping the specimen to the laboratory, the collector distributes the copies of the CCF to the laboratory, MRO, employer, and employee. *Id.* at § 40.73(a)(9).[6]

As for how the results are reported to the employer, the regulations state that MROs *may* provide the employer a signed or stamped photocopy of Copy 2 (the MRO copy) of the CCF to report the test results. *Id.* at § 40.163(b). *By design*, Copy 2 does *not* contain certification of the laboratory's chain of custody. The same is true of Copy 4 (the employer's copy).

If the MRO does not provide Copy 2, he or she *must* provide the employer a report that includes the following information:

> (1) Full name, as indicated on the CCF, of the employee tested;
> (2) Specimen ID number from the CCF and the donor SSN or employee ID number;
> (3) Reason for the test, if indicated on the CCF (e.g., random, post-accident);
> (4) Date of the collection;
> (5) Date you received Copy 2 of the CCF;
> (6) Result of the test (i.e., positive, negative, dilute, refusal to test, test cancelled) and the date the result was verified by the MRO;
> (7) For verified positive tests, the drug(s)/metabolite(s) for which the test was positive;
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[5] Available at https://www.samhsa.gov/sites/default/files/workplace/2017-federal-ccf.pdf. (Last accessed April 15, 2020.)

[6] As federal drug testing further incorporates electronic recordkeeping and reporting, Electronic Custody and Control Forms may be used.

Id. at § 40.163(c). We highlight that the regulations authorize MROs to report only the qualitative results— that is, the drug or its metabolite is recorded as either negative or positive, without the quantity reported. An MRO is *not* permitted to provide to the employer the *quantitative* values of the analytes tested. *Id.* at § 40.163(g) ("[An MRO] must *not* provide quantitative values to the [designated employer representative] or [consortium/third-party administrator] for drug or validity test results").

The MRO's report is what employers commonly provide in reemployment assistance proceedings to establish proof of a positive drug test result under the DOT drug testing program. Indeed, this comes as little surprise as laboratories are not permitted to provide the employer the test results ordinarily under the regulations; instead, laboratories must provide them to the MRO directly. *Id.* at § 40.97(b) ("As a laboratory, you must report laboratory results directly, and only, to the MRO at his or her place of business. You must not report results to or through the [designated employer representative] or a service agent").

C. Applicable Evidentiary Standards

The reemployment assistance law contains two relevant evidentiary provisions that should be considered in assessing the competency and sufficiency of an employer's evidence regarding a claimant's positive drug test result. The first to consider is Section 443.101(11), Florida Statutes, under which a claimant's positive drug test and chain of custody documentation can create a rebuttable presumption of drug use, if the employer meets all the provision's conditions. The second is Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes, which the Commission commonly refers to as the "residual hearsay exception." We discuss both provisions, in turn, in more detail below.

Section 443.101(11), Florida Statutes, provides that "the drug test results and chain of custody documentation provided to the employer by a licensed and approved drug-testing laboratory is self-authenticating and admissible in reemployment assistance hearings, and such evidence creates a rebuttable presumption that the individual used, or was using, controlled substances." The applicability of the provision is subject to the following conditions:

> (a) To qualify for the presumption described in this subsection, an employer must have implemented a drug-free workplace program under ss. 440.101 and 440.102, and must submit proof that the employer has qualified for the insurance discounts provided under s. 627.0915, as certified by the insurance carrier or self-insurance unit. In lieu of these requirements, an employer

> who does not fit the definition of "employer" in s. 440.102 may qualify for the presumption if the employer is in compliance with equivalent or more stringent drug-testing standards established by federal law or regulation.
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> (b) Only laboratories licensed and approved as provided in s. 440.102(9), or as provided by equivalent or more stringent licensing requirements established by federal law or regulation may perform the drug tests.
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Id.

Even if the employer does not present evidence sufficient to establish the rebuttable presumption, the employer may still meet its burden to show misconduct for a failed drug test by way of Section 443.151(4)(b)5.c.(I)-(II), Florida Statutes. *See* R.A.A.C. Case No. 15-04393, at pg. 4, n.1 (March 24, 2016) ("a consequence of the adoption of the 'residual' hearsay exception in 2011 . . . is that an employer may establish competent proof of violation of a drug policy without meeting all of the elements of Section 443.101(11), Florida Statutes"). The residual hearsay exception provides that hearsay evidence may be used to support a finding of fact if:

> (I) The party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing; and
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> (II) The appeals referee or special deputy determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

§443.151(4)(b)5.c., Fla. Stat. As this Commission has explained, a factfinder must weigh evidence admissible under the residual hearsay exception and determine whether that evidence is sufficiently probative and persuasive independent of the automatic presumption of Section 443.101(11), Florida Statutes. *See* R.A.A.C. Case No. 15-04393, at pg. 4, n.1. Importantly, as explained in more detail later, the admissibility and probative value of the chain of custody and test results are generally not in question where: the documents are properly provided and foundation is properly laid; the documents are consistent with relevant drug testing standards; and there is no specific evidence calling into question the veracity of the documents.

We now turn to the competency and sufficiency of the employer's evidence in this case.

V.
Ultimate Findings of Fact and Conclusions of Law

The claimant's drug test was governed by the DOT drug testing procedures and regulations, under which the claimant was a covered transportation employee.

The employer's evidence regarding the drug test results and the chain of custody include: the quantitative drug test results reported by the laboratory, the MRO's report, the MRO copy of the CCF, the test facility copy of the CCF, and the employer copy of the CCF. The MRO's report, the MRO copy of the CCF, and the employer copy of the CCF were properly authenticated and are admissible as business records. § 90.803(6), Fla. Stat. The remaining documents— the quantitative drug test results and the test facility copy of the CCF— are self-authenticating and admissible under Section 443.101(11), Florida Statutes, as discussed above.

This evidence, combined with the employer's testimony regarding its participation in Florida's workers' compensation drug-free workplace testing program, is sufficient to establish the rebuttable presumption, pursuant to Section 443.101(11), Florida Statutes, that the claimant used cocaine, which was a violation of the employer's policy and the DOT and FMCSA regulations. *See* 49 C.F.R. § 40.85(b); 49 C.F.R. § 382.215.

The claimant did not meet his shifted burden to rebut the presumption of illicit drug use. As an explanation for the positive result, the claimant testified that many donors were present at the clinic when his sample was collected. To the extent his testimony is that the authenticity of the results could have been compromised due to the amount of donors present, we reject such a theory. Moreover, the claimant's testimony in this regard is insufficient to overcome the employer's competent evidence and testimony adduced at the hearing that show the integrity of the chain of custody.

Consequently, the Commission concludes the claimant's failed drug test, in violation of the employer's controlled substance and alcohol policy, amounted to disqualifying misconduct under subparagraph (e)1. (defining misconduct as "a violation of an employer's rule"). The claimant has neither asserted nor otherwise established any of the subparagraph's enumerated defenses. We further conclude the claimant's failed drug test constituted a conscious disregard of the employer's

interests and deliberate disregard of the employer's reasonable expectations of him as a specially-licensed driver in a safety-sensitive position which is disqualifying misconduct under subparagraph (a). The claimant is thus disqualified from benefits under Section 443.101(1)(a) and (d), Florida Statutes.

VI.
DOT Drug Testing Evidence in RA Cases

Finally, we write to clarify the competency and sufficiency of the employer's evidence as to the drug test and chain of custody that was submitted *to the appeals referee*, as that documentation is far more commonly the type of evidence provided by employers in cases involving the DOT drug testing program.

At the hearing below, the employer provided the MRO report showing the qualitative drug test results and Copy 4 of the CCF (the employer copy), which, as noted, provides only the chain of custody from the collection site, *not* the testing facility. These two items are the type of evidence most employers provide in reemployment assistance proceedings simply because, under DOT testing standards, this is what they usually receive.

Thus, in the large majority of reemployment assistance cases dealing with DOT testing, the question is whether qualitative results from an MRO, as recorded in either the MRO report or Copy 2 of the CCF (the MRO copy), and partial chain of custody (i.e., the chain of custody that includes the collection facility but does not include the testing facility) are competent evidence to support a finding of illicit or unauthorized drug use. The answer is usually yes, under the residual hearsay exception. § 443.151(4)(b)5.c.(I)-(II), Fla. Stat. (providing that hearsay evidence is competent to support a finding where it is trustworthy and probative and the party against whom it was offered had an opportunity to review it prior to the hearing).

Under the residual hearsay exception, a referee should find testing and chain of custody documents provided to the employer pursuant to the DOT drug testing program presumptively trustworthy and probative, *so long as* the documents are properly authenticated, [7] and clearly identify the individual who authored or

[7] An employer need only provide a witness who can competently testify that the document is an accurate copy of what was received from the provider.

executed the documents.[8] Once these documents are properly admitted, the claimant (the opponent of the evidence) must *raise the issue of and prove* the untrustworthiness of the evidence.[9] This can be accomplished by identifying *specific* information or circumstances that show lack of trustworthiness. Mere speculation or a general denial of drug use is not enough to meet this burden.

Documents supplied to employers under the DOT program are presumptively trustworthy because they have been completed in accordance with federal mandates that are designed to ensure the authenticity of the chain of custody and reliability of the drug test results. Moreover, these documents are completed by impartial individuals who are knowledgeable of the federal mandates and deemed qualified under Part 40. *See* 49 C.F.R. § 40.33 (setting forth the qualification and training requirements of collection personnel); *id.* at § 40.121 (setting forth the credentials and qualification requirements of MROs). *See also id.* at § 40.123(a) (explaining that an MRO acts as "an independent and impartial 'gatekeeper' and *advocate for the accuracy and integrity of the drug testing process*") (emphasis added).

We are not concerned that the employer's documentation below does not include the testing facility chain of custody. Under DOT testing protocols, MROs receive and are responsible for reviewing the test facility CCF to ensure compliance with Part 40 procedures. *Id.* at § 40.129. Thus, we find an MRO's verification that the testing procedures were done in accordance with Part 40, as evidence by a confirmed positive test result, is sufficient to repair the missing link in the chain of

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[8] As with any document provided under the residual hearsay exception, the identity of the declarant supplying the information contained therein must be clearly identified so the opponent of the document can subpoena the declarant if desired. Thus, in regard to a document used to report the test result to the employer under the DOT drug testing program (that is, the MRO report or Copy 2 of the CCF), the certifying MRO must be clearly identified. In regard to Copy 4 of the CCF, the specimen collector must be clearly identified.

[9] This burden-shifting framework is designed to favor the admission of relevant evidence and follow the standards commonly applied under the business records exception to hearsay evidence. §90.803(6)(a), Fla. Stat.; *see Love v. Garcia*, 634 So. 2d 158 (Fla. 1994) (presuming trustworthiness of documents under business records exception); *Nimmons v. State*, 814 So. 2d 1153, 1154-55 (Fla. 5th DCA 2002) ("[o]nce the party offering the evidence lays a predicate pursuant to section 90.803(6)(a), the burden is on the party opposing admission to prove the untrustworthiness of the [evidence]").

custody for purposes of assessing trustworthiness of the evidence under the residual hearsay exception. Likewise, we are not concerned that the test results reported to the employer do not include the *quantitative* values of the analytes tested, where, such as here, the testing protocols and cutoff thresholds used to determine a positive test result are clear.[10]

Finally, we note that the analysis of drug testing evidence is complicated by the numerous and sometimes overlapping statutory and regulatory schemes that govern workplace drug testing. This order addresses testing pursuant to DOT mandates, which are common in our cases, and these involve a specific federal testing protocol, which we apply herein. Other federally-mandated drug testing relies on a similar protocol contained in SAMHSA's *Mandatory Guidelines for Federal Workplace Drug Testing Programs,*[11] as it may be amended from time to time.[12] Testing undertaken under state law may be governed by the Drug-Free Workplace program in the Florida Workers' Compensation law, or other state or local standards, and confirmation testing must be conducted by a laboratory licensed

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[10] The referee's conclusion that the MRO report was inadmissible under the residual hearsay exception is erroneous, but in fairness to the referee, the evidence provided by employers has changed over time. Not that many years ago, it was common for employers to submit both a *fully completed* CCF *and* the *quantitative* clinical drug test results. However, changes in the federal law (in both DOT- and SAMHSA- based testing) have changed the way data is reported and what laboratories and MROs can, and are required to, provide to employers. As recently as 2014, the Commission itself held the same view as the referee did here. In this order, we also recede from our older orders such as R.A.A.C. Order No. 13-08212 (November 27, 2013), which held that MRO summaries are insufficient as "test results" under Section 443.101(11), Florida Statutes.

[11] *See* Department of Health and Human Services, Substance Abuse and Mental Health Services Administration; Mandatory Guidelines for Federal Workplace Drug Testing Programs, 82 Fed. Reg. 7920 (January 23, 2017).
https://www.samhsa.gov/sites/default/files/workplace/frn_vol_82_7920_.pdf. (Last accessed April 16, 2020.)

[12] While this order does not address the application of the Mandatory Guidelines, we note that this protocol closely mirrors the DOT protocols in terms of disclosures to employers. As with the DOT protocols, the Mandatory Guidelines provide for disclosure of the employer copy of the CCF (containing only the collection site information) and either "the completed MRO copy of the Federal CCF or a separate report using a letter/memorandum format." *Id.* at § 13.9.

by the Agency for Health Care Administration. Because such laboratories also conduct federal testing, it would not be surprising to see similar documentation provided to employers under state law, particularly in light of the lack of any specific direction in Florida licensing standards as to the documentation that must be provided to employers.[13]

Thus, as a starting point in analyzing cases involving drug testing, it is paramount that a referee must first identify the legal authority and testing protocols underlying the drug screen (that is, whether the drug test was conducted in accordance with DOT or other non-DOT, Federal Workplace Drug Testing programs, or Florida's Drug Free Workplace Act under Sections 440.102 and 102.0455, Florida Statutes). The standards outlined in this part should provide guidance for most drug testing cases that may come before referees.

[13] Florida's drug testing licensure laws require only that the MRO provide a "verification letter to the employer revealing the final verified test result." Fla. Admin. Code R. 59A-24.008(10)(c).

VII.
Disposition

DEO's initial determination, Issue Identification No. 0035 8237 19-01, is affirmed. The claimant is disqualified from receipt of benefits for the week ending May 11, 2019, the five succeeding weeks, and until he becomes reemployed and earns $4,675. The employer's account is relieved of charges in connection with this claim. As a result of this order, any benefits received by the claimant to which the claimant is not entitled may be considered an overpayment subject to recovery, with the specific amount of any overpayment to be calculated by DEO and set forth in a separate overpayment determination, which may then be appealed.

It is so ordered.

REEMPLOYMENT ASSISTANCE APPEALS COMMISSION

Frank E. Brown, Chairman
Thomas D. Epsky, Member
Joseph D. Finnegan, Member

This is to certify that on 4/28/2020, the above order was filed in the office of the Clerk of the Reemployment Assistance Appeals Commission, and a copy mailed to the last known address of each interested party.

By: Kady Ross
Deputy Clerk

DEPARTMENT OF ECONOMIC OPPORTUNITY
REEMPLOYMENT ASSISTANCE PROGRAM
PO BOX 5250
TALLAHASSEE, FL 32314 5250

*80662228 *

Docket No.0035 8237 19-03 Jurisdiction: §443.151(4)(a)&(b) Florida Statutes

CLAIMANT/Appellant ***EMPLOYER/Appellee***

APPEARANCES:

Claimant

Employer

DECISION OF APPEALS REFEREE

Important appeal rights are explained at the end of this decision.

Derechos de apelación importantes son explicados al final de esta decisión.

Yo eksplike kèk dwa dapèl enpòtan lan fen desizyon sa a.

SEPARATION: Whether the claimant was discharged for misconduct connected with work or voluntarily left work without good cause as defined in the statute, pursuant to Sections 443.101(1), (9), (10), (11), (13); 443.036(29), Florida Statutes; Rule 73B-11.020, Florida Administrative Code.

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Issues Involved:

CHARGES TO EMPLOYER'S EMPLOYMENT RECORD: Whether benefit payments made to the claimant will be charged to the employment record of the employer, pursuant to Sections 443.101(9); 443.131(3)(a), Florida Statutes; Rules 73B-10.026; 11.018, Florida Administrative Code. (If charges are not at issue on the current claim, the hearing may determine charges on a subsequent claim.)

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rules 73B-20.016; 20.017.

Jurisdictional Issue (Failure to appear): The claimant received a notice indicating a telephone hearing was scheduled for June 17, 2019 at 12:15 pm Eastern time. The claimant called the Department to update his contact number and was ready and available to participate in the hearing. The claimant did not receive the call from the hearing officer because he had no phone service. The claimant filed a request to reopen the next day.

Jurisdictional Conclusions of Law (Failure to appear): A case will be re-opened for a hearing on the merits when a party requests a reopening within 20 days of rendition of the decision and establishes good cause for not attending a previous hearing. If good cause is not established, the previous decision will be reinstated.

The hearing record and evidence reflect that the claimant received notice and was able and available to participate in the hearing. The claimant missed the hearing officer's call due to extenuating circumstances, which constitutes good cause for his nonappearance. Accordingly, the appeals referee has jurisdiction to address the merits of the case.

Findings of Fact: The claimant was employed as a driver by the employer, a trucking company, starting in November 2011. The claimant was aware that the employer follows federal guidelines and is required to pass random drug tests. The claimant was required to pass a drug test pursuant to the employer's policy and terms of hire. The employer has implemented a drug-free workplace program pursuant to Florida's worker's compensation law and FMCSA. The claimant took a random drug test on April 29, 2019. The employer received results from the lab indicating the claimant allegedly tested positive for cocaine. The claimant asked for a retest because he did not use cocaine. The employer discharged the claimant for testing positive for cocaine and violating its policy.

Conclusions of Law: As of May 17, 2013, the Reemployment Assistance Law of Florida defines misconduct connected with work as, but is not limited to, the following, which may not be construed in pari materia with each other:

a. Conduct demonstrating conscious disregard of an employer's interests and found to be a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of his or her employee. Such conduct may include, but is not limited to, willful damage to an employer's property that results in damage of more than $50; theft of employer property or property of a customer or invitee of the employer.

b. Carelessness or negligence to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer.

c. Chronic absenteeism or tardiness in deliberate violation of a known policy of the employer or one or more unapproved absences following a written reprimand or warning relating to more than one unapproved absence.

d. A willful and deliberate violation of a standard or regulation of this state by an employee of an employer licensed or certified by this state, which violation would cause the employer to be sanctioned or have its license or certification suspended by this state.

e. 1. A violation of an employer's rule, unless the claimant can demonstrate that:

a. He or she did not know, and could not reasonably know, of the rule's requirements;

b. The rule is not lawful or not reasonably related to the job environment and performance; or

c. The rule is not fairly or consistently enforced.

2. Such conduct may include, but is not limited to, committing criminal assault or battery on another employee, or on a customer or invitee of the employer; or committing abuse or neglect of a patient, resident, disabled person, elderly person, or child in her or his professional care.

The burden of proving misconduct is on the employer. Lewis v. Unemployment Appeals Commission, 498 So.2d 608 (Fla. 5th DCA 1986). The proof must be by a preponderance of competent substantial evidence. De Groot v. Sheffield, 95 So.2d 912 (Fla. 1957); Tallahassee Housing Authority v. Unemployment Appeals Commission, 483 So.2d 413 (Fla. 1986).

In cases of discharge, the burden is on the employer to establish that the discharge was for misconduct connected with work. The record herein shows the employer discharged the claimant for testing positive for cocaine in violation of its policy, federal policy and state policy. The employer offered testimony that the claimant was discharged based on the positive test results.

The employer's evidence and testimony is considered hearsay. When an employer's evidence is insufficient to establish qualification for the presumption described in Section 443.101(11), Florida Statutes, the employer's evidence may nevertheless be sufficient to support a finding of fact under the general hearsay provisions. Section 443.151(4)(b)5.c., Florida Statutes, provides that hearsay evidence may be used for the purpose of supplementing or explaining other evidence, or to support a finding if it would be admissible over objection in civil actions. Notwithstanding Section 120.57(1)(c), Florida Statutes, hearsay evidence may support a finding of fact in a proceeding before an appeals referee if the party against whom it is offered has a reasonable opportunity to review such evidence prior to the hearing and the appeals referee determines, after considering all relevant facts and circumstances, that the evidence is trustworthy and probative and that the interests of justice are best served by its admission into evidence.

In the instant case, the employer failed to present proof that the employer qualified for the insurance discounts provided under Section 627.0915, Florida Statutes, as certified by the insurance carrier or self-insurance unit. Moreover, the employer did not submit a copy of the claimant's actual drug test results, which would reflect numerical results, quantities, and etcetera. Instead, the employer submitted a summarization of the drug test results, reflecting the conclusion that the drug test results were "positive" for cocaine. Accordingly, the review of the hearing record reveals the evidence proffered by the employer fails to satisfy all of the requirements of Section 443.101(11), Florida Statutes. Furthermore, the employer's evidence is insufficient under the general hearsay provisions to support a finding of fact that the claimant tested positive for cocaine and/or that she/he violated the employer's policy. The document containing a summarization of the actual drug test results amounts to hearsay within hearsay, which does not meet the requirements of Section 443.151(4)(b)5.a., Florida Statutes. Additionally, the best evidence rule, as set forth in Section 90.952, Florida Statutes, provides in pertinent part that "Except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." Moreover, the rule requires that, if the original evidence or a statutorily authorized alternative is available, no evidence should be received which is merely "substitutionary in nature." Liddon v. Bd. of Pub. Instruction for Jackson County, 175 So. 806, 808 (Fla. 1937); see also Sun Bank of St. Lucie County v. Oliver, 403 So. 2d 583, 584 (Fla. 4th DCA 1981). Because the summarization of the drug test results was used to establish the results of the drug test, without submission of the drug test results themselves, the employer also failed to comply with the best evidence rule. In addition, the chain of custody is insufficient evidence in that it simply states that a collector or employer representative sent a specimen, bottle(s) to FedEx. There is no way to determine what happened to the specimen after it was released to FedEX. Accordingly, this document standing alone is insufficient to establish that the claimant violated the employer's policy.

The claimant's testimony that he had not used cocaine is accepted as credible. The record therefore shows the claimant did not violate the employer's rules, nor did the claimant engage in conduct that demonstrated conscious disregard of the employer's interests, nor did the claimant engage in conduct that was a deliberate violation or disregard of the reasonable standards of behavior which the employer expects of its employees, neither did the claimant engage in behavior that was careless or negligent to a degree or recurrence that manifests culpability, or wrongful intent, or shows an intentional and substantial disregard of the employer's interest or of the employee's duties and obligations to his or her employer. Accordingly, it is held the claimant was discharged for reasons other than misconduct connected with the work and is therefore not subject to disqualification pursuant to Florida law.

The hearing officer was presented with conflicting testimony regarding material issues of fact and is charged with resolving these conflicts. In Order Number 2003-10946 (December 9, 2003), the Commission set forth factors to be considered in resolving credibility questions. These factors include the witness' opportunity and capacity to observe the event or act in question; any prior inconsistent statement by the witness; witness bias or lack of bias; the contradiction of the witness' version of events by other evidence or its consistency with other evidence; the inherent improbability of the witness' version of events; and the witness' demeanor. Upon considering these factors, the hearing officer finds the testimony of the claimant to be more credible. Therefore, material conflicts in the evidence are resolved in favor of the claimant.

The law provides that benefits will not be charged to the employment record of a contributing employer who furnishes required notice to the Department when the claimant was discharged for misconduct connected with the work.

Pursuant to this decision, the employer's account is subject to charges should any benefits be paid on this claim.

Decision: The claimant had good cause for his nonappearance. The Notice of Disqualification dated May 31, 2019 disqualifying the claimant because the discharge was for misconduct connected with the work and holding the employer's account not chargeable is **REVERSED.** The claimant is qualified because the discharge was for reasons other than misconduct connected with the work.

If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the department and set forth in a separate overpayment determination, unless specified in this decision. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

This is to certify that a copy of the above decision was distributed/mailed to the last known address of each interested party on July 15, 2019.

S. Rosenthal
Appeals Referee

By: Ivette Conrado

Ivette Conrado, Deputy Clerk

IMPORTANT - APPEAL RIGHTS: This decision will become final unless a written request for review or reopening is filed within 20 calendar days after the distribution/mailed date shown. If the 20th day is a Saturday, Sunday or holiday defined in F.A.C. 73B-21.004, filing may be made on the next day that is not a Saturday, Sunday or holiday. If this decision disqualifies and/or holds the claimant ineligible for benefits already received, the claimant will be required to repay those benefits. The specific amount of any overpayment will be calculated by the Department and set forth in a separate overpayment determination. However, the time to request review of this decision is as shown above and is not stopped, delayed or extended by any other determination, decision or order.

A party who did not attend the hearing for good cause may request reopening, including the reason for not attending, at connect.myflorida.com or by writing to the address at the top of this decision. The date of the confirmation page will be the filing date of a request for reopening on the Department's Web Site.

A party who attended the hearing and received an adverse decision may file a request for review to the Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org.** If mailed, the postmark date will be the filing date. If faxed, hand-delivered, delivered by courier service other than the United States Postal Service, or submitted via the Internet, the date of receipt will be the filing date. To avoid delay, include the docket number and the last five digits of the claimant's social security number. A party requesting review should specify any and all allegations of error with respect to the referee's decision, and provide factual and/or legal support for these challenges. Allegations of error not specifically set forth in the request for review may be considered waived.

There is no cost to have a case reviewed by the Commission, nor is a party required to be represented by an attorney or other representative to have a case reviewed. The Reemployment Assistance Appeals Commission has not been fully integrated into the Department's CONNECT system. While correspondence can be mailed or faxed to the Commission, no correspondence can be submitted to the Commission via the CONNECT system. All parties to an appeal before the Commission must maintain a current mailing address with the Commission. A party who changes his/her mailing address in the CONNECT system must also provide the updated address to the Commission, in writing. All correspondence sent by the Commission, including its final order, will be mailed to the parties at their mailing address on record with the Commission.

IMPORTANTE - DERECHOS DE APELACIÓN: Esta decisión pasará a ser final a menos que una solicitud por escrito para revisión o reapertura se registre dentro de 20 días de calendario después de la distribución/fecha de envìo marcada en que la decisión fue remitida por correo. Si el vigésimo (20) día es un sábado, un domingo o un feriado definidos en F.A.C. 73B-21.004, el registro de la solicitud se puede realizar en el día siguiente que no sea un sábado, un domingo o un feriado. Si esta decisión descalifica y/o declara al reclamante como inelegible para recibir beneficios que ya fueron recibidos por el reclamante, se le requerirá al reclamante rembolsar esos beneficios. La cantidad específica de cualquier sobrepago [pago excesivo de beneficios] será calculada por la Agencia y establecida en una determinación de pago excesivo de beneficios que será emitida por separado. Sin embargo, el límite de tiempo para solicitar la revisión de esta decisión es como se establece anteriormente y dicho límite no es detenido, demorado o extendido por ninguna otra determinación, decisión u orden.

Una parte que no asistió a la audiencia por una buena causa puede solicitar una reapertura, incluyendo la razón por no haber comparecido en la audiencia, en connect.myflorida.com o escribiendo a la dirección en la parte superior de esta decisión. La fecha de la página de confirmación será la fecha de presentación de una solicitud de reapertura en la página de Internet del Departamento.

Una parte que asistió a la audiencia y recibió una decisión adversa puede registrar una solicitud de revisión con la Comisión de Apelaciones de Servicios de Reempleo; Reemployment Assistance Appeals Commission, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Fax: 850-488-2123); **https://raaciap.floridajobs.org**. Si la solicitud es enviada por correo, la fecha del sello de la oficina de correos será la fecha de registro de la solicitud. Si es enviada por telefax, entregada a mano, entregada por servicio de mensajería, con la excepción del Servicio Postal de Estados Unidos, o realizada vía el Internet, la fecha en la que se recibe la solicitud será la fecha de registro. Para evitar demora, incluya el número de expediente [*docket number*] y los últimos cinco dígitos del número de seguro social del reclamante. Una parte que solicita una revisión debe especificar cualquiera y todos los alegatos de error con respecto a la decisión del árbitro, y proporcionar fundamentos reales y/o legales para substanciar éstos desafíos. Los alegatos de error que no se establezcan con especificidad en la solicitud de revisión pueden considerarse como renunciados.

No hay ningún costo para tener un caso revisado por la Comisión, ni es requerido que una parte sea representado por un abogado u otro representante para poder tener un caso revisado. La Comisión de Apelación de Asistencia de Reempleo no ha sido plenamente integrado en el sistema CONNECT del Departamento. Mientras que la correspondencia puede ser enviada por correo o por fax a la Comisión, ninguna correspondencia puede ser sometida a la Comisión a través del sistema CONNECT. Todas las partes en una apelación ante la Comisión deben mantener una dirección de correo actual con la Comisión. La parte que cambie su dirección de correo en el sistema CONNECT también debe proporcionar la dirección actualizada a la Comisión, por escrito. Toda la correspondencia enviada por la Comisión, incluida su orden final, será enviada a las partes en su dirección de correo en el registro con la Comisión.

ENPÒTAN - DWA DAPÈL: Desizyon sa a ap definitif sòf si ou depoze yon apèl nan yon delè 20 jou apre dat distribisyon/postaj. Si 20yèm jou a se yon samdi, yon dimanch oswa yon jou konje, jan sa defini lan F.A.C. 73B-21.004, depo an kapab fèt jou aprè a, si se pa yon samdi, yon dimanch oswa yon jou konje. Si desizyon an diskalifye epi/oswa deklare moun k ap fè demann lan pa kalifye pou alokasyon li resevwa deja, moun k ap fè demann lan ap gen pou li remèt lajan li te resevwa a. Se Ajans lan k ap kalkile montan nenpòt ki peman anplis epi y ap detèmine sa lan yon desizyon separe. Sepandan, delè pou mande revizyon desizyon sa a se delè yo bay anwo a; Okenn lòt detèminasyon, desizyon oswa lòd pa ka rete, retade oubyen pwolonje dat sa a.

Yon pati ki te gen yon rezon valab pou li pat asiste seyans lan gen dwa mande pou yo ouvri ka a ankò; fòk yo bay rezon yo pat ka vini an epi fè demann nan sou sitwèb sa a, connect.myflorida.com oswa alekri nan adrès ki mansyone okomansman desizyon sa a. Dat cofimasyon page sa pral jou ou ranpli deman pou reouvewti dan web sit depatman.

Yon pati ki te asiste odyans la epi li resevwa yon desizyon negatif kapab soumèt yon demann pou revizyon retounen travay Asistans Komisyon Apèl la, Suite 101 Rhyne Building, 2740 Centerview Drive, Tallahassee, Florida 32399-4151; (Faks: 850-488-2123); https://raaciap.floridajobs.org. Si poste a, dat tenm ap dat li ranpli aplikasyon. Si fakse, men yo-a delivre, lage pa sèvis mesaje lòt pase Etazini Sèvis nan Etazini Nimewo, oswa soumèt sou Entènèt la, dat yo te resevwa ap dat li ranpli aplikasyon. Pou evite reta, mete nimewo rejis la ak senk dènye chif nimewo sekirite sosyal demandè a sosyal demandè a sekirite. Yon pati pou mande revizyon ta dwe presize nenpòt ak tout akizasyon nan erè ki gen rapò ak desizyon abit la, yo epi bay sipò reyèl ak / oswa legal pou defi sa yo. Alegasyon sou erè pa espesyalman tabli nan demann nan pou revizyon yo kapab konsidere yo egzante.

Pa gen okenn kou pou Komisyon an revize yon ka, ni ke yon pati dwe reprezante pa yon avoka oubyen lòt reprezantan pou ke la li a revize. Komisyon Apèl Asistans Reyanbochaj pa te entegre antyèman nan sistèm CONNECT Depatman an. Byenke korespondans kapab fakse oubyen pòste bay Komisyon an, okenn korespondans pa kapab soumèt bay Komisyon an atravè sistèm CONNECT. Tout pati ki nan yon apèl devan Komisyon an dwe mentni yon adrès postal ki ajou avèk Komisyon an. Yon pati ki chanje adrès postal li nan sistèm CONNECT la dwe bay Komisyon an adrès ki mete ajou a tou. Tout korespondans ke Komisyon an voye, sa enkli manda final li, pral pòste voye bay pati yo nan adrès postal yo genyen nan achiv Komisyon an.
