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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1455**

Emmanuel Buabeng,
Relator,

vs.

Best Buy Warehousing Logistics, Inc.,
Respondent,

Department of Employment and Economic Development,
Respondent.

**Filed April 15, 2013
Affirmed
Chutich, Judge**

Department of Employment and Economic Development
File No. 29515600-3

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Considered and decided by Johnson, Chief Judge; Peterson, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

Relator Emmanuel Buabeng challenges the unemployment-law judge's determination that he is ineligible for unemployment benefits because he was discharged for employment misconduct. Buabeng asserts that the evidence is insufficient to support the judge's factual findings and that he was denied a fair hearing because the judge failed to compel evidence and failed to allow cross-examination of a witness. Because the evidence supports the judge's findings and because Buabeng was afforded a fair hearing, we affirm.

FACTS

On September 22, 2001, Buabeng began working as a full-time asset-protection officer at respondent Best Buy Warehousing Logistics, Inc. (Best Buy), a warehouse complex that services and delivers goods to Best Buy retail stores. Buabeng's duties included checking and verifying trucks as they arrived and departed the facility, as well as general security. He worked in a guard shack at the facility's single entrance, where he was responsible for verifying the contents of every truck coming and going. In February and March of 2012, when the events leading to Buabeng's termination took place, approximately 30 to 45 trucks passed through Best Buy's facility each day.

The first incident relevant to Buabeng's termination occurred on February 8, 2012, when Buabeng checked in a trailer but failed to verify that the number on the trailer was the same as the number on the paperwork given to him by the driver. Essentially, Buabeng checked in the wrong trailer, causing a mix-up. While Best Buy would have

been responsible for any loss stemming from Buabeng's mistake, the error turned out to be harmless. Best Buy gave Buabeng a written warning informing him that the error violated its trailer check-in policy. The document stated that it was a "final warning," and Buabeng was aware that his job was in jeopardy.

A little over a month later, on March 19, 2012, Best Buy gave Buabeng an "Involuntary Separation Notice." The notice stated that he allowed trucks to leave the facility without inspection on three separate occasions and that on March 7 he was "witnessed waving a truck through the gate again without checking credentials." Best Buy thus terminated Buabeng's employment.

Buabeng applied for unemployment benefits from respondent Minnesota Department of Employment and Economic Development (department). The department determined that he was eligible for benefits, finding that Buabeng's actions did not amount to employment misconduct. Best Buy appealed this determination, and the unemployment-law judge held a telephone hearing at which Buabeng testified, along with his Best Buy supervisor Chad Tellinghuisen.

The Involuntary Separation Notice stated that Buabeng was discharged for allowing vehicles to go through the gate without inspection on three occasions, in addition to an incident on March 7. At the hearing, however, Tellinghuisen testified that Buabeng was discharged for waving a truck through the gate on March 2, and also for the trailer mix-up on February 8. Tellinghuisen stated that he watched the surveillance video of the March 2 incident on March 7, which is why the separation notice reflected that erroneous date.

Tellinghuisen testified about the March 2 incident. He stated that, under Best Buy procedures, Buabeng was to inspect the cargo area of each trailer leaving the facility and verify either that the trailer was empty or, if it contained items, that Best Buy had paperwork for the items and verify the trailer number against the paperwork. A driver typically pulled the truck and trailer up to the gatehouse and Buabeng was expected to physically go out and inspect each trailer. Tellinghuisen testified that no exceptions to this procedure exist for full-sized semi-trailers, and that Buabeng failed to inspect one such trailer on March 2.

Tellinghuisen was not physically present at the gatehouse on March 2, but became aware of the failure to inspect when he was alerted to it by a maintenance worker who witnessed Buabeng waving a truck through without inspection. Tellinghuisen then watched surveillance video a few days later and saw Buabeng wave the truck through. Buabeng denied failing to inspect the truck on March 2. Because of this conflicting testimony and because he believed that the surveillance video would be the best evidence of whether Buabeng actually waved the trailer through without verification, the unemployment-law judge continued the hearing and ordered Best Buy to produce the surveillance video.

Best Buy then submitted two videos, one showing the inside of the gatehouse and one showing the area outside of the gatehouse. At the continued hearing, Tellinghuisen testified that the two videos showed the “same incident, same truck, same day and time.” The outside video did not display the date or time it was taken, however, while the inside video did display the date and time.

The outside video was taken from a motion-activated camera and showed a FedEx freight truck rolling by the gatehouse without stopping. The video also shows the maintenance worker, who later reported Buabeng's failure to inspect the truck, entering the gatehouse. Best Buy did not submit any footage before the truck appears in the frame because, according to Tellinghuisen, "it's very difficult to get off the system." In addition, Tellinghuisen testified that, to his recollection, "this particular trailer or this particular exit was not entered into the system." Best Buy did not introduce any log or record noting the missing entry.

Buabeng's counsel suggested to Tellinghuisen that perhaps Buabeng stopped and inspected the truck before it appeared in the frame on the outside video. Tellinghuisen denied this possibility, stating that he watched a longer portion of video and that Buabeng never stopped or inspected the truck before it entered the frame. Buabeng's counsel asked the judge to compel Best Buy to produce more video footage, but the judge denied the request, concluding that additional video would be cumulative and inconclusive.

The inside video showed Buabeng in the gatehouse, sitting at his desk and watching something on the computer. The video also shows the same maintenance worker walking into the gatehouse. Tellinghuisen testified that, a few minutes later, it shows Buabeng "waving off this truck and not going out and physically checking it." Tellinghuisen stated that he watched 15 or 20 minutes of earlier footage from the inside camera and that Buabeng never got up and left the gatehouse during that time.

Buabeng testified that it is not uncommon for drivers to not drive out of the facility immediately after inspection. Instead, he stated that drivers often use the

restroom or sit in the truck for a while, doing paperwork or talking to their dispatcher before leaving the facility. He estimated that, after inspection, they could sit in the area for up to five or ten minutes before leaving. Buabeng admitted that the video showed him waving off the truck through the window on March 2, but stated that he likely inspected the truck before it left and then he went back to his desk. Buabeng did not, however, have a specific recollection of the truck in question.

The unemployment-law judge found that Buabeng waved the truck through without inspection on March 2, that Buabeng's assertion that he probably inspected the truck earlier was "implausible, unconvincing, and self-serving," and that it would be "patently unnatural that the truck would have stopped in a position before getting close to the guard shack." The judge credited Tellinghuisen's "candid and un-impeached" testimony that he viewed the video for a longer period of time and did not see Buabeng get up to inspect the vehicle. The judge found that Best Buy's testimony and evidence was "more credible than Buabeng's because it was more logical and probable under the circumstances and established a more likely chain of events." The judge therefore concluded that Buabeng was discharged because of employment misconduct and denied him unemployment benefits. The judge affirmed the decision on reconsideration, and Buabeng now appeals.

DECISION

In reviewing the decision of an unemployment-law judge, this court may "affirm the decision, remand it for further proceedings, or reverse or modify it if the relator's substantial rights have been prejudiced because the findings, inferences, conclusion, or

decision is affected by an error of law or is unsupported by substantial evidence in view of the record as a whole.” *Sykes v. Nw. Airlines, Inc.*, 789 N.W.2d 253, 255 (Minn. App. 2010); *see also* Minn. Stat. § 268.105 subd. 7(d) (2012).

I. Sufficiency of the Evidence

An employee who is discharged for “employment misconduct” is ineligible for unemployment benefits. Minn. Stat. § 268.095, subd. 4(1) (2012). “Whether an employee engaged in employment misconduct presents a mixed question of fact and law. Whether the employee committed a particular act is an issue of fact. . . . Whether the facts constitute employment misconduct is a question of law, which this court reviews *de novo*.” *Cunningham v. Wal-Mart Assocs., Inc.*, 809 N.W.2d 231, 235 (Minn. App. 2011) (citation omitted).

Findings of fact are reviewed in the light most favorable to the judge’s decision, the judge’s credibility determinations are given deference, and “we will not disturb the [unemployment-law judge’s] factual findings when the evidence substantially sustains them.” *Skarhus v. Davanni’s, Inc.*, 721 N.W.2d 340, 344 (Minn. App. 2006). An unemployment-law judge’s credibility findings must also be supported by substantial evidence. *Wichmann v. Travalia & U.S. Directives, Inc.*, 729 N.W.2d 23, 29 (Minn. App. 2007). “A judge may only use reliable, probative, and substantial evidence as a basis for decision.” Minn. R. 3310.2922 (2011).

Buabeng does not dispute that failing to inspect a truck before allowing it to leave Best Buy’s facility is clearly against company policy and would be employment misconduct. *See* Minn. Stat. § 268.095, subd. 6(1) (2012); *Schmidgall v. FilmTec Corp.*,

644 N.W.2d 801, 804 (Minn. 2002) (stating that failing to comply with an employer's reasonable policy is misconduct). Rather, Buabeng argues that the judge's factual finding that he did, in fact, wave the truck through without inspection on March 2 is not substantially supported by the evidence. The Minnesota Supreme Court has stated that, to be supported by substantial evidence, a "decision must be supported by either (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Center for Env. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 466 (Minn. 2002).

Viewing the unemployment-law judge's findings in the light most favorable to the decision, and giving deference to the judge's credibility determinations and ability to weigh the evidence, we conclude that substantial evidence supports the judge's finding that Buabeng committed employment misconduct. Best Buy produced the two videos, along with Tellinghuisen's testimony that he viewed 15 to 20 additional minutes of footage of the inside video and never saw Buabeng leave the gatehouse or otherwise check the FedEx trailer. Tellinghuisen also testified that another Best Buy employee witnessed Buabeng's failure to inspect the trailer on March 2, and both videos from March 2 corroborate this person's presence at the guard shack. *See Minn. R. 3310.2922* (2011) (allowing an unemployment-law judge to "receive any evidence that possesses probative value, *including hearsay*" (emphasis added)).

Buabeng offered the alternative possibility that he had checked the trailer earlier, the driver then stopped to use the restroom or do paperwork, and that Buabeng waved at

the truck as it left because he already verified it. The unemployment-law judge, however, did not find this testimony plausible in light of Tellinghuisen's testimony. The judge listened to all the evidence and made credibility determinations, which are "the exclusive province of the [unemployment-law judge] and will not be disturbed on appeal." *Skarhus*, 721 N.W.2d at 345. Further, as required by statute, the judge clearly set out his reasons for crediting Tellinghuisen's testimony. Minn. Stat. § 268.105, subd. 1(c) (2012).

Buabeng said it was likely that he had inspected the truck before it left the facility. Tellinghuisen's testimony, by contrast, was based on his viewing of the videos and corroborated by the portion of the videos produced, the maintenance worker's report that Buabeng failed to verify the trailer's contents, and the appearance in the March 2 videos of the employee who made the report. Tellinghuisen also testified that Buabeng failed to enter the truck in Best Buy's system.

Buabeng's version of events is further undermined by Tellinghuisen's testimony that he did not observe Buabeng leave the guard shack in the 15 to 20 minutes of video footage before the portion submitted by Best Buy. If, as Buabeng testified, trucks only stop for "roughly five to ten minutes" after inspection before leaving the facility, the earlier video viewed by Tellinghuisen would have shown Buabeng leaving the gatehouse to inspect the truck. Considering the evidence in its entirety, we therefore conclude that

the judge's finding that Buabeng committed employment misconduct is supported by substantial evidence.¹

II. Fair Hearing

Buabeng also challenges the fairness of his hearing before the unemployment-law judge, arguing that the judge erred in failing to compel Best Buy to produce additional video evidence and refusing to allow his attorney to cross-examine a witness.

Department rules require the unemployment-law judge to “exercise control over the hearing procedure in a manner that protects the parties’ rights to a fair hearing.” Minn. R. 3310.2921 (2011). The hearing is an “evidence gathering inquiry” and the judge “must ensure that all relevant facts are clearly and fully developed.” Minn. Stat. § 268.105, subd. 1(b) (2012).

Failure to Compel Evidence

Buabeng argues that the judge failed to clearly and fully develop the record when he denied Buabeng's request to compel Best Buy to produce additional video of the March 2 incident. An unemployment-law judge generally has discretion over the admission of evidence and need not follow common law or statutory rules of evidence. Minn. Stat. § 268.105, subd. 1(b). Further, the judge may exclude evidence that is “irrelevant, immaterial, unreliable, or unduly repetitious.” Minn. R. 3310.2922.

¹ Buabeng also argues that Best Buy failed to offer evidence of all of the incidents leading to his termination as listed in the Involuntary Separation Notice. Buabeng failed to make this argument to the unemployment-law judge, however, and we thus decline to address it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Even if we consider it, however, the February 8 incident involved a “final warning.” Buabeng agreed that his job was in jeopardy after that warning and all parties recognized that another serious episode could result in termination.

The judge noted the importance of the surveillance videos and took the initiative in the first hearing to compel Best Buy to produce the videos. Buabeng suggests that those short videos did not show any failure to inspect the trailer. Buabeng's assertion, however, that he inspected the trailer before the time shown in the videos is directly contrary to Tellinghuisen's testimony that he watched 15 to 20 minutes of earlier video footage and never observed Buabeng leave the guard shack or otherwise inspect the trailer. Further, Buabeng contends that the outside surveillance video does not capture the whole area of the yard in which trucks stop for inspection, suggesting that additional video evidence may be inconclusive as to whether he did or did not inspect the truck. Given the totality of the evidence considered by the unemployment-law judge, we conclude that the judge sufficiently developed the record and did not abuse his discretion in denying Buabeng's request to compel additional video

Failure to Allow Cross-Examination

Buabeng also argues that the unemployment-law judge erred in failing to allow his attorney to cross-examine Tellinghuisen about the reliability and accuracy of the two videos. Specifically, Buabeng's attorney tried to ask Tellinghuisen for specific details about the videos and how he determined that the inside and outside videos depicted the same time period. In an unemployment-benefits hearing, "[o]pposing parties have the right to examine witnesses, object to exhibits and testimony, and cross-examine the other party's witnesses." Minn. R. 3310.2921 (2011).

After carefully reviewing the transcript, we conclude that the unemployment-law judge did not improperly foreclose Buabeng's right to cross-examine Tellinghuisen.

Tellinghuisen testified that the videos were from the same time period, even though the outside video did not include a time stamp, stating that “when I pull out the video on the system I pull it up by date and time.” As the judge noted, it seems that Buabeng’s attorney was “just not satisfied” with this answer, and that any further questions would not have elicited a different answer. Further, the record reflects that the judge gave Buabeng’s attorney ample opportunity to question Tellinghuisen about the March 2 incident, and also exercised his authority in limiting the testimony of Best Buy.

Because Buabeng received a fair hearing and the unemployment-law judge’s factual findings are supported by substantial evidence, we affirm the judge’s determination that Buabeng is ineligible for unemployment benefits.

Affirmed.