

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Frank H. Seehousen,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1389 C.D. 2010
	:	
Unemployment Compensation Board	:	Submitted: December 17, 2010
of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: June 14, 2011

Frank H. Seehousen (Claimant) petitions for review of the Order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of the Unemployment Compensation Referee (Referee) finding Claimant ineligible for benefits pursuant to Section 402(e) of the Unemployment Compensation Law (Law),¹ 43 P.S. § 802(e). Claimant argues that the Board erred in remanding the matter to the Referee to allow Carlisle Carrier Corporation (Employer) to introduce certified copies of Claimant’s convictions for involuntary manslaughter and receipt of stolen property.

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended.

Employer terminated Claimant for lying on his employment application: Claimant stated on the application that he had not been convicted of a crime, and Employer subsequently discovered that Claimant had been convicted of involuntary manslaughter and receipt of stolen property. Employer thereupon terminated Claimant. Claimant applied for Unemployment Compensation (UC) benefits, which were granted by the UC Service Center. Employer appealed this determination and a hearing was held before the Referee on November 20, 2009. At the hearing, Employer introduced, *inter alia*, records of Claimant's criminal convictions. Claimant's counsel objected to the introduction of the conviction records on the grounds that they were not certified records from the Court of Common Pleas and the conviction records were, therefore, hearsay. The Referee overruled this objection. The Referee issued a decision reversing the determination of the UC Service Center and determined Claimant to be ineligible for benefits. Claimant appealed to the Board, arguing that the conviction records were hearsay and could not provide substantial evidence to support the Referee's determination. By Order dated February 4, 2010, the Board directed that the matter be remanded to the Referee for the purpose of "allow[ing] the parties the opportunity to provide a certified copy of the Court Order disposing of the criminal matters at issue." (Remand Order, February 4, 2010.) In addition, the Board directed that "[t]he scope of further hearings shall be governed by any memorandum of the Board's legal staff which accompanies the Notice of Hearing." (Remand Order, February 4, 2010.) The memo from the Board's legal staff invited answers to the following questions:

1. To the employer, did the employer discuss the alleged convictions with the claimant when discharging him?

2. Did the claimant admit to the convictions?
3. To the claimant, were you convicted for or did you plead guilty to the crimes of manslaughter and receiving stolen property as alleged?
4. If so, why did you not include this information on your application?

(Memo to Referee from Board Legal Department (February 1, 2010).) Claimant's counsel sent a letter to the Board objecting to the Remand Order on the ground that Employer could have introduced certified conviction records at the initial hearing before the Referee and that the remand gave Employer "a second bite at the apple." (Letter from Claimant's Counsel to Board (February 15, 2010) at 1.) The remand hearing was held before the Referee on April 13, 2010. At the hearing, Employer provided certified copies of Claimant's conviction records. Claimant's counsel objected to the remand hearing itself, but made no other objections.

Following the remand hearing, the Board issued a Decision and Order in which it made the following findings of fact:

1. For the purposes of this appeal, the claimant was employed for approximately fifteen months with Carlisle Carrier Corporation as a full-time over-the-road truck driver earning \$.40 per mile. The claimant's last day of work was April 24, 2009.
2. The employer's rules and regulations include a rule prohibiting falsification of documents, including the application for employment. Violation of the employer's rule prohibiting falsification may result in discipline up to and including termination.
3. The employer's rules and regulations are included in the employee handbook.

4. The [claimant] acknowledged receipt of the employee handbook.
5. On his application for employment, the claimant answered “no” to the question of whether he was ever convicted of a crime.
6. Approximately one year and three months after the claimant’s initial hire, the employer found that the third party provider who conducted the criminal background checks was failing to find complete criminal histories.
7. The employer engaged another third party provider who conducted a random sampling of applicants who began employment around the time the claimant began employment.
8. It was discovered that the claimant had a criminal history including felony convictions for involuntary manslaughter and receiving stolen property.
9. The claimant was convicted of involuntary manslaughter when he strangled another individual, and he pled guilty to receiving stolen property when he stole a car to flee the state after committing the above crime.
10. As an over[-]the[-]road truck driver, the claimant was entrusted with cargo sometimes worth millions of dollars.
11. As soon as the employer was made aware of the claimant’s criminal history, the employer terminated the claimant’s employment for violations of the employer’s rule prohibiting falsification of documents, including the application for employment.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-11.) The Board rejected Claimant’s argument that it erred in remanding the case for the introduction of certified copies of Claimant’s convictions, noting that it has a duty to preserve the UC Fund and that it has the discretion to remand a case in order to reach an appropriate result

where the record is insufficient. (Board Decision at 2.) Claimant now petitions this Court for review.²

Before this Court, Claimant argues that the Board abused its discretion in remanding the matter to allow Employer to cure its failure to introduce certified copies of Claimant’s criminal convictions at the initial hearing before the Referee. Section 504 of the Law, 43 P.S. § 824, provides in relevant part that:

The board shall have power, on its own motion, or on appeal, to remove, transfer, or review any claim pending before, or decided by, a referee, and in any such case and in cases where a further appeal is allowed by the board from the decision of a referee, may affirm, modify, or reverse the determination or revised determination, as the case may be, of the department or referee on the basis of the evidence previously submitted in the case, or direct the taking of additional evidence.

Id. The Board’s regulation implementing Section 504 provides in relevant part:

The Board will review the previously established record and determine whether there is a need for an additional hearing. Under section 504 of the Unemployment Compensation Law (43 P. S. § 824), the Board may affirm, modify or reverse the decision of the referee on the basis of the evidence previously submitted in the case, *or the Board may direct the taking of additional evidence, if in the opinion of the Board, the previously established record is not sufficiently complete and adequate to enable the Board to render an appropriate decision.* The further appeal shall be allowed and additional evidence required in any of the following circumstances:

² “In unemployment compensation cases, our review ‘is limited to determining whether [a c]laimant’s constitutional rights were violated,’ whether the Board’s findings of fact are supported by substantial evidence, and whether an error of law was committed below.” Maskerines v. Unemployment Compensation Board of Review, 13 A.3d 553, 555 n.3 (Pa. Cmwlth. 2011) (alteration in original) (quoting Wagner v. Unemployment Compensation Board of Review, 965 A.2d 323, 325 n.5 (Pa. Cmwlth. 2009)).

(1) Whenever the further appeal *involves a material point on which the record below is silent or incomplete* or appears to be erroneous.

34 Pa. Code § 101.104(c) (emphasis added). Here, the Board remanded the matter to allow introduction of certified copies of Claimant’s conviction records because the record made before the Referee was incomplete on a material point of the appeal—whether Claimant had been convicted of a crime prior to the time he filled out his employment application.

Claimant argues that the Remand Order was erroneous because it gave Employer “a second bite at the apple.” (Claimant’s Br. at 9.) In support of this argument, Claimant relies upon Primecare Medical, Inc. v. Unemployment Compensation Board of Review, 760 A.2d 483 (Pa. Cmwlth. 2000).³ In Primecare, the Board remanded the case for further evidence, and the referee overseeing the remand hearing refused to hear testimony offered by the employer that was beyond the scope of the Board’s remand. This Court held that the referee did not abuse his discretion because the offered testimony was beyond the scope of the remand. Id. at 487-88. Primecare is distinguishable from the current case because there, this Court was considering an argument by the employer that a referee erred in refusing to accept an offer of evidence that went beyond the scope of the remand ordered by the Board, whereas in this case, we are considering whether the Board abused its discretion in ordering a remand. In Primecare, this Court did state in passing that if the referee had admitted the additional testimony, it would have given the

³ Claimant’s brief also contains a number of arguments and citations to authority for the principle that the uncertified criminal records introduced in the initial hearing before the Referee were not admissible. The Board does not dispute that issue before this Court.

employer a “second bite at the apple.” Id. at 488. However, this statement was made with regard to testimony that the employer did not attempt to introduce at the initial hearing. Here, the Employer did attempt to introduce evidence of Claimant’s prior convictions through non-certified copies of the criminal dockets and conviction information. While this evidence was objected to as hearsay, this left the record incomplete, indeed silent, since Claimant did not testify on his own behalf on the issue of whether Claimant had been convicted of a crime when he filled out his employment application with Employer. Therefore, we cannot say that the Board erred in remanding the matter for introduction of certified copies of the criminal conviction. We also note that the Board included in the scope of its Remand Order the question of whether, if the Claimant was convicted of manslaughter and receiving stolen property, why Claimant did not disclose this information on his employment application, thereby leaving the door open for Claimant to show good cause for his misconduct. We, therefore, decline to hold, under the facts of this case, that the Board abused its discretion or committed an error of law in remanding this matter for the introduction of certified copies of Claimant’s convictions.

For these reasons, we affirm the order of the Board.

RENÉE COHN JUBELIRER, Judge

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ORDER

NOW, June 14, 2011, the Order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge