

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Betsy J. Myers, :  
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 : Petitioner :  
 :  
 : v. : No. 2240 C.D. 2009  
 :  
 : Unemployment Compensation : Submitted: April 9, 2010  
 : Board of Review, :  
 : Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE PATRICIA A. McCULLOUGH, Judge  
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE KELLEY

FILED: May 27, 2010

Betsy J. Myers (Claimant), *pro se*, petitions for review from an order of the Unemployment Compensation Board of Review (Board), which affirmed the referee's decision denying benefits. We affirm.

Claimant last worked as a full-time laboratory technician for Covance, Inc. (Employer) from July 7, 2008 until her last day of employment on April 6, 2009. Claimant applied for unemployment compensation benefits. The Philadelphia UC Service Center (UC Service Center) denied Claimant's application for benefits on the basis that Claimant was ineligible for benefits under Section 402(e.1) of the

Unemployment Compensation Law<sup>1</sup> (Law) for failure to pass a drug test. Claimant appealed to the referee, which affirmed.

Claimant then filed an appeal with the Board. The Board adopted the findings and conclusions of the referee, which are set forth as follows. After Claimant was involved in an accident at work on April 2, 2009, Claimant was referred to Employer's medical provider for a routine drug test, as required by Employer's practices and procedures. Claimant's drug screen came back positive for cocaine. Employer met with Claimant and provided her with a plan under which Claimant was suspended and referred to a mandatory counseling program, after which Claimant had to submit to a drug test 48 hours prior to returning to work. Upon her return, Claimant would also be subject to random drug testing. Claimant fulfilled her obligation with the program, but when a drug test was administered to Claimant 48 hours prior to her scheduled return to work, the drug test came back positive for cocaine. Claimant asked Employer if she could submit the results of the drug tests administered while she was in the rehab program, but Employer would not accept these results because cocaine metabolizes quickly, which is why Employer requires the test 48 hours prior to returning to work. The test results submitted by Claimant showed a positive indication for creatinine, which the referee opined hurt Claimant more than helped because it is well known that creatinine is often used by individuals undergoing drug tests to mask cocaine and spoil samples. After Employer's receipt of the positive test results, Employer discharged Claimant in accordance with its policies.

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<sup>1</sup> Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, as amended, 43 P.S. §802(e.1), added by the Act of December 9, 2002, P.L. 1330.

Based upon these findings, the Board concluded that Claimant was ineligible for benefits pursuant to Section 402(e.1) of the Law. By decision dated September 23, 2009, the Board affirmed referee's decision denying benefits. This appeal now follows.<sup>2</sup>

Claimant contends that the Board improperly admitted two exhibits from the diagnostic lab as business records, over Claimant's objection, because Employer failed to present proper chain of custody evidence. We disagree.

To begin, the Board is the ultimate fact finder and the arbiter of witness credibility. Peak v. Unemployment Compensation Board of Review, 509 Pa. 267, 501 A.2d 1383 (1985); Rapid Pallet v. Unemployment Compensation Board of Review, 707 A.2d 636 (Pa. Cmwlth. 1998). When the Board's findings of fact are supported by substantial evidence they are binding on this Court even though evidence was also introduced to the contrary. Unemployment Compensation Board of Review v. Jones, 352 A.2d 574 (Pa. Cmwlth. 1976). The fact that conflicting evidence is presented does not mean that there is no substantial evidence to support the eventual finding since it is the function of the Board, and not this Court, to resolve questions of credibility and conflicts in testimony. Geesey v. Unemployment Compensation Board of Review, 381 A.2d 1343 (Pa. Cmwlth. 1978). Our duty as an appellate court is to examine the testimony in a light most favorable to the party in whose favor the Board has found, giving that party the benefit of all inferences that can logically and reasonably be drawn from the testimony to see if substantial

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<sup>2</sup> This Court's scope of review is limited to determining whether constitutional rights were violated, an error of law was committed, or necessary findings of fact are not supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704; Kirkwood v. Unemployment Compensation Board of Review, 525 A.2d 841 (Pa. Cmwlth. 1987).

evidence for the Board's conclusions exists. Wheelock Hatchery, Inc. v. Unemployment Compensation Board of Review, 648 A.2d 103 (Pa. Cmwlth. 1994).

Section 402(e.1) of the Law provides:

An employe shall be ineligible for compensation for any week---

(e.1) In which his unemployment is due to discharge or temporary suspension from work due to failure to submit and/or pass a drug test conducted pursuant to an employer's established substance abuse policy, provided that the drug test is not requested or implemented in violation of the law or of a collective bargaining agreement

43 P.S. §802(e.1). To render an employee ineligible for unemployment compensation benefits pursuant to Section 402(e.1) of the Law, the employer must establish it adopted a substance abuse policy and that the employee failed to submit and/or pass the drug test pursuant to that policy. Turner v. Unemployment Compensation Board of Review, 899 A.2d 381 (Pa. Cmwlth. 2006), petition for allowance of appeal denied, 591 Pa. 669, 916 A.2d 636, (2007); UGI v. Unemployment Compensation Board of Review, 851 A.2d 240 (Pa. Cmwlth. 2004).

In unemployment compensation cases, the conduct of hearings and appeals are in accordance with the rules of procedure prescribed by the Board, whether or not such rules conform to common law or statutory rules of evidence and other technical rules of procedure. Section 505 of the Law, 43 P.S. §825; Kai-Jay Pants Co., Division of Philip Gurian Sons, Inc. v. Unemployment Compensation Board of Review, 372 A.2d 493 (Pa. Cmwlth. 1977). The hearsay rule is applicable in unemployment compensation proceedings. Ford v. Unemployment Compensation Board of Review, 498 A.2d 449 (Pa. Cmwlth.

1985). Hearsay evidence, admitted without objection, will be given its natural probative effect and may support a finding of the Board if it is corroborated by any competent evidence in the record. Ford; Orloski v. Unemployment Compensation Board of Review, 415 A.2d 720 (Pa. Cmwlth. 1980). However, hearsay evidence, properly objected to, is not competent evidence to support a finding of the Board. Orloski.

Not every out-of-court statement offered into evidence to prove the truth of the matter asserted is excluded by the hearsay rule. Pa.R.E. 803. “Records of regularly conducted activity” are not excluded by the hearsay rule, even though the declarant is available as a witness. Pa.R.E. 803(6). “Records of regularly conducted activity” are defined as:

A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness....

Id. Under this exception, it is not essential to produce either the person who made the entries or the custodian of the record at the time the entries were made or that the witness qualifying the business records even has personal knowledge of the facts reported in the business record. In re Indyk's Estate, 488 Pa. 567, 413 A.2d 371 (1979); Virgo v. Workers' Compensation Appeal Board (County of Lehigh-Cedarbrook), 890 A.2d 13 (Pa. Cmwlth. 2005). As long as the authenticating witness can provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of

trustworthiness of the business records of a company, a sufficient basis is provided to offset the hearsay character of the evidence. Id.

Here, the referee admitted into evidence two exhibits offered by Employer: a chain of custody control form (Exhibit No. 2) and a laboratory test result (Exhibit No. 3) as business records.<sup>3</sup> Claimant objected to the admission of these exhibits on chain of custody grounds. In support of her position, Claimant relies upon UGI. Therein, we determined that a chain of custody objection must be made prior to the admission of the evidence. UGI. Chain of custody is an inquiry undertaken to demonstrate the relevancy and admissibility of proffered evidence. Id. Laboratory reports showing the outcome of tests on urine samples are irrelevant unless the factfinder has some assurance that the reports relate to the right sample. Id. A witness may testify on chain of custody even though the witness cannot testify to every minute of the specimen's handling. Commonwealth v. Bolden, 486 Pa. 383, 406 A.2d 333 (1979); UGI. It is the province of the factfinder to weigh the value of such testimony in deciding whether to admit a specimen, or a report on said specimen, notwithstanding gaps in the chain of custody. Id.

While Claimant's objection was timely raised at the hearing, any gaps in the chain of custody go to the weight of the evidence presented, not to its admissibility.<sup>4</sup> Id. Employer's human resource director testified that the exhibits are routine documents whenever a drug test is conducted on one of its employees;

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<sup>3</sup> The Board sustained Claimant's objection to Exhibit No. 1.

<sup>4</sup> As we recognized in UGI, "at some point, the gaps may be so significant that the proponent's testimony will be assigned so little weight as to be inadequate. In that case, the specimen, or report on the specimen, will be denied admission as evidence." UGI, 851 A.2d at 250 n.23.

the clinic which performed the test handles all of Employer's occupational medical surveillance. Notes of Testimony at 5. Although some of the information on the chain of custody form was not filled out, Claimant completed the donor portion of the chain of custody and affirmed that the specimen was hers and was sealed in her presence. Id.; Exhibit No. 2. The other evidence presented showed that the specimen was received by the laboratory with its chain of custody complete and the specimen seal intact and that the specimen identified as belonging to Claimant tested positive for cocaine. Exhibits No. 3. Employer's exhibits are relevant evidence of reasonably probative value and are records of regularly conducted business activity qualifying as business records. Employer's witness provided sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness of the business records. We, therefore, conclude that the Board did not err or abuse its discretion by admitting these items into evidence over Claimant's chain of custody objection.

Accordingly, the order of the Board is affirmed.

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JAMES R. KELLEY, Senior Judge

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|                           | : |                    |
| Respondent                | : |                    |

**ORDER**

AND NOW, this 27th day of May, 2010, the order of the Unemployment Compensation Board of Review, at Decision No. B-489032, dated September 23, 2009, is AFFIRMED.

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JAMES R. KELLEY, Senior Judge