

IN THE UTAH COURT OF APPEALS

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Target Interact US, LLC,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 20090904-CA
v.)	
)	
Workforce Appeals Board,)	F I L E D
Department of Workforce)	(September 16, 2010)
Services; and Jody Peterson,)	
)	2010 UT App 255
Respondents.)	

Original Proceeding in this Court

Attorneys: Sarah J. Beck, Salt Lake City, for Petitioner
Suzan Pixton and Michael E. Bulson, Salt Lake City,
for Respondents

Before Judges McHugh, Thorne, and Voros.

THORNE, Judge:

Target Interact US, LLC (Target) seeks judicial review of a final decision of the Workforce Appeals Board (the Board) awarding unemployment benefits to Jody Peterson. We uphold the Board's decision.

Target raises several arguments challenging the Board's decision. Target argues that it provided substantial evidence of Peterson's culpability, knowledge, and control to the Board necessitating a finding that Peterson was discharged for just cause; that there are internal contradictions between the original decision of the Administrative Law Judge (ALJ) and the subsequent Board decision; that Target met the "substantial evidence" test while Peterson did not; that the Board's decision exceeds the bounds of reasonableness and rationality; and that Target's due process rights were violated when the initial Department of Workforce Services (the Department) adjudicator provided perjured testimony to the ALJ.

Before we address the substance of Target's arguments, we note that Target's briefing is deficient in several respects and that these defects alone would be grounds for this court to

decline to disturb the Board's decision. Of particular concern is Target's failure to marshal the evidence in support of the Board's decision. See generally Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-day Saints, 2007 UT 42, ¶ 17 & n.3, 164 P.3d 384 ("To successfully challenge an agency's factual findings, the party must marshall [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." (alteration in original) (internal quotation marks omitted)). Target's central disagreement with the Board's decision is factual, and Target's failure to marshal the evidence in support of the Board's decision impermissibly shifts the burden of combing the record for supporting evidence onto this court.¹

We additionally caution that Target's argument accusing a Department witness of perjury, with no supporting evidence, constitutes scandalous material inappropriate for inclusion in briefs to this court. See generally Utah R. App. P. 24(k) ("All briefs under this rule must be . . . free from burdensome, irrelevant, immaterial or scandalous matters."). Perjury is a serious criminal offense, see Utah Code Ann. § 76-8-502 (2008) (rendering the making of a false material statement under oath in any official proceeding, without a belief that the statement is true, a second degree felony), and allegations of perjury with no supporting basis in fact have no place in briefs to this court.

Here, Target argues that its records showing phone calls to the witness's number necessarily renders perjurious her testimony that she had not spoken with Target about the Peterson matter. However, there are numerous other possible explanations for the asserted discrepancy between the records and the witness's testimony.² Further, testimony is not perjury per se merely because it is inconsistent with or contradictory to other evidence. Establishing perjury as that crime is defined in Utah requires much more. See id. In the absence of evidence suggesting that the witness actually perjured herself, the

¹Compounding the problem, Target largely fails to provide record cites, as required, for the evidence that it does identify in its briefing. See generally Utah R. App. P. 24(a)(7) ("All statements of fact and references to the proceedings below shall be supported by citations to the record").

²For example, the witness could have simply forgotten her conversations with Target, or Target's calls could have been answered by another employee, voice mail, or an automated response system.

allegations in Target's briefs are not appropriate. Cf. Peters v. Pine Meadow Ranch Home Ass'n, 2007 UT 2, ¶ 9, 151 P.3d 962 ("Counsel's unfounded accusations regarding the supposed improper motives of the court of appeals panel are . . . scandalous in that they are defamatory and offensive to propriety."). Consequently, we strike those portions of Target's briefs and do not consider them further.³

Despite the shortcomings in Target's briefing, we consider and reject each of Target's remaining appellate arguments on its merits. As to Target's arguments about the substantial evidence test and the reasonableness and rationality of the Board's decision, this court has stated,

To determine if the Appeals Board's decision is reasonable and rational, we apply the substantial evidence test, which requires us to examine all of the evidence supporting the Board's findings and [determine whether,] despite the supporting facts and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence given the record as a whole. Granting what the supreme court has referred to as 'maximum deference,' we will uphold the basic facts the Appeals Board relied on in reaching its ultimate conclusion if there is evidence of any substance that can reasonably be regarded as supporting the determination made.

Petro-Hunt, LLC v. Department of Workforce Servs., 2008 UT App 391, ¶ 20, 197 P.3d 107 (alteration in original) (citation and internal quotation marks omitted), cert. denied, 205 P.3d 103 (Utah 2009). Here, the Board's decision is supported by Peterson's own testimony--testimony that the ALJ expressly found to be more credible than that of Target's witnesses. Thus, the Board's decision is supported by substantial evidence and cannot be characterized as lacking reason or rationality.

³We do note that the factual dispute underlying the perjury allegation--whether Target had made good faith efforts to provide information to the Department--was tangential to the ultimate question of benefits and was resolved in Target's favor by the ALJ. Additionally, the witness's alleged perjury was brought to the Board's attention by Target prior to the Board's de novo review of the evidence, after which the Board still concluded that Peterson is entitled to benefits.

Target also argues that there are internal contradictions between the conclusions of the ALJ--which the Board expressly adopted--and the Board's own expressed conclusions. For example, the ALJ concluded that Target had demonstrated Peterson's culpability and knowledge but not his control. The Board, despite its express adoption of the ALJ's reasoning and conclusions, independently concluded that Target had failed to demonstrate Peterson's culpability, knowledge, or control. Even assuming that these allegedly conflicting conclusions create some contradiction,⁴ Target has failed to demonstrate prejudice as both the ALJ and the Board agreed that Target had not demonstrated Peterson's control. The conclusions of the ALJ and the Board were therefore ultimately in concurrence that Peterson is entitled to unemployment benefits.

For these reasons, we reject Target's arguments and uphold the Board's decision allowing Peterson unemployment benefits.

William A. Thorne Jr., Judge

I CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

VOROS, Judge (concurring):

I concur in the result and in that portion of the memorandum decision concluding that Target's briefing does not satisfy the requirements of rule 24 of the Utah Rules of Appellate Procedure. While I agree that Target's claims of error lack merit, I would affirm on the ground that they are inadequately briefed.

J. Frederic Voros Jr., Judge

⁴The Board's decision can, of course, be implicitly read as adopting the ALJ's findings, reasoning, and conclusions only to the extent that they are not inconsistent with the Board's own expressed findings, reasoning, and conclusions.