IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

HERTRICH NISSAN,	)
	) C. A. No. K10A-07-005 JTV
Appellant,	)
	)
v.	)
	)
UNEMPLOYMENT INSURANCE APPEAL BOARD and MATTHEW E. MALAGO,	)
	)
	)
Appellees.	)

Submitted: April 1, 2011
Decided: July 27, 2011

William J. Cattie, Esq., Rawle & Henderson, Wilmington, Delaware. Attorney for Appellant.

Katisha D. Fortune, Esq., Department of Justice, Wilmington, Delaware. Attorney for the Appellee Unemployment Insurance Appeal Board.

Upon Consideration of Appellant's
Appeal From Decision of the
Unemployment Insurance Appeal Board
AFFIRMED

VAUGHN, President Judge

Hertrich Nissan v. UIAB, et al.
C.A. No. K10A-07-005 JTV
July 27, 2011

ORDER

Upon consideration of the parties' briefs and the record of the case, it appears that:

1. The appellant, Hertrich Nissan, appeals from a decision of the Unemployment Insurance Appeal Board which granted unemployment benefits to one of its former employees. Mathew Malago, the appellee, was employed as an automotive technician by Hertrich from May 15, 2003 until November 23, 2009. On October 26, 2009, he was involved in an accident at work and did not return to work until November 16, 2009. On the day of his return, he was administered a drug test. The result was positive for marijuana. He admitted to consuming marijuana a few days after the accident, but otherwise denied the use of marijuana at any time relevant to his claim for unemployment benefits.

2. As a result of the positive drug test, the appellee was terminated from employment on the grounds that his drug use was in violation of Hertrich's drug policy. In pertinent part, Hertich's drug policy reads "[w]hile on Hertrich's premises and while conducting business-related activities off Hertrich's premises, no employee may use, possess, distribute, sell, be under the influence of alcohol or a prohibited drug or the drug metabolites in their system."

3. The Board's decision granting unemployment benefits reversed a decision of an Appeals Referee. The Appeals Referee held that the appellee's admission to using marijuana and the positive drug test were sufficient to find that he violated the aforementioned drug policy. The Board, however, refused to consider the drug test under the hearsay rule because the employer did not produce a witness

qualified to testify as to the sample-taking procedures and the chain of custody. The Board reasoned that the appellee's admission alone was insufficient evidence of a violation of the policy because it, by itself, did not establish that the appellee was under the influence of the drug when he returned to work on November 16.

4. In reviewing decisions from the Board, the court is limited to consideration of the record which was before the administrative agency.[1] The court must determine whether the findings and conclusions of the Board are free from legal error and are supported by substantial evidence in the record.[2] Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[3] The court does not weigh the evidence, determine questions of credibility of the witnesses, the weight to be given to their testimony, or make its own factual findings.[4] The reviewing court merely determines if the evidence is legally adequate to support the agency's factual findings.[5] Where a party bearing the

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[1] *Hubbard v. Unemployment Ins. Appeal Bd.*, 352 A.2d 761, 763 (Del. 1976).

[2] *Unemployment Ins. Appeal Bd. v. Martin*, 431 A.2d 1265, 1266 (Del. 1981); *Pochvatilla v. United States Postal Serv.*, 1997 WL 524062, at *2 (Del. Super. 1997); 19 *Del. C.* § 3323(a) ("In any judicial proceeding under this section, the findings of the [UIAB] as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the Court shall be confined to questions of law.").

[3] *Oceanport Ind. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 899 (Del. 1994); *Battista v. Chrysler Corp.*, 517 A.2d 295, 297 (Del. Super. 1986).

[4] *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66 (Del. 1965).

[5] *Majaya v. Sojourners' Place*, 2003 WL 21350542, at *4 (Del. Super. 2003); *see* 19 *Del. C.* § 3323(a) (providing that, absent fraud, the factual findings of the Board shall be conclusive and the jurisdiction of a reviewing court shall be confined to questions of law.).

burden of proof fails to convince the Board below, the resulting finding of fact can be overturned by the court "only for errors of law, inconsistencies, or capricious disregard for competent evidence."[6]

5. Pursuant to 19 *Del. C.* § 3314 an employee is ineligible to receive unemployment benefits if he or she has been terminated for just cause.[7] The term "just cause" denotes a wilful or wanton act in violation of either the employer's interest or the employee's expected standard of conduct.[8] Wilful or wanton conduct is "that which is evidenced by either conscious action, or reckless indifference leading to a deviation from established and acceptable workplace performance."[9] In a termination case, the employer has the burden of proving just cause.[10]

6. Violation of a reasonable company rule may constitute just cause for discharge, if the employee is aware of the policy and the possible subsequent

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[6] *Ridings v. Unemployment Ins. Appeal Bd.*, 407 A.2d 238 (Del. Super. 1979).

[7] The statute provides: "An individual shall be disqualified for benefits ... [f]or the week in which the individual was discharged from the individual's work for just cause in connection with the individual's work and for each week thereafter until the individual has been employed in each of 4 subsequent weeks ...." 19 *Del. C.* § 3314(2).

[8] *Moeller v. Wilmington Sav. Fund Soc'y*, 723 A.2d 1177, 1179 (Del. 1999); *Tuttle v. Mellon Bank of Del.*, 659 A.2d 786, 789 (Del. Super. 1995); *Abex Corp. v. Todd*, 235 A.2d 271, 271 (Del. Super. 1967).

[9] *MRPC Fin. Mgmt. LLC v. Carter*, 2003 WL 21517977, at *4 (Del. Super. 2003).

[10] *Country Life Homes, Inc. v. Unemployment Ins. Appeal Bd.*, 2007 WL 1519520, at *3 (Del. Super. May 8, 2007); *Carter*, 2003 WL 21517977, at *4.

termination.[11] This Court uses a two-step analysis to evaluate just cause: "1) whether a policy existed, and if so, what conduct was prohibited, and 2) whether the employee was apprised of the policy, and if so, how was he made aware."[12] Knowledge of a company policy may be established by evidence of a written policy, such as an employer's handbook[13] or by previous warnings of objectionable conduct.[14]

7. The appellant contends that the appellee waived any hearsay objection to the introduction into evidence of the drug test result because he did not raise a hearsay objection before either the Appeals Referee or the Board. It further contends that the Board capriciously disregarded competent evidence. Finally, it contends that the Board violated the employer's due process rights by applying the hearsay rule without notice.

8. This Court has previously upheld decisions by the Board refusing to consider a drug test result under the hearsay rule where the employer did not produce a qualified witness to testify concerning the sample-taking procedures and the chain of custody.[15] In those cases, the test result was excluded both at the Appeals Referee and Board levels, unlike here, where it was admitted at the Appeals Referee level but

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[11] *McCoy v. Occidental Chem. Corp.*, 1996 WL 111126, at *3 (Del. Super. 1996).

[12] *Id. see Parvusa v. Tipton Trucking Co. Inc.*, C.A. No. 92A-12-009 (Del. Super. 1993).

[13] *Id.* (citing *Honore v. Unemployment Ins. Appeal*, 1993 WL 485918 (Del. Super. Oct. 5, 1993).

[14] *Id.*

[15] *Eastern Shore Poultry, Inc. v. Lewis,* 2000 WL 703808,(Del. Super. 2000); *Brooks Armored Car Service, Inc. v. Stollings*, 1994 WL 233901 (Del. Super. 1994).

excluded at the Board level. However, as discussed below, I conclude that the result should be the same.

9. In arguing that the appellee waived any hearsay objection, Hertrich relies upon cases where an appellant attempted to raise an issue for the first time before this Court without it having been raised or considered at any point during the administrative agency process.[16] Those cases are distinguishable. The record in this case indicates that the appellee did object to introduction of the test result at the Appeals Referee hearing, although not on hearsay grounds. More importantly, in this case I find that the appellee's failure to object to introduction of the test result on hearsay grounds before the Appeals Referee or the Board is overcome by the Board's raising the issue itself.

10. I see no error in the Board's invoking the hearsay rule *sua sponte* without an objection from a claimant, especially where, as here, the claimant is unrepresented. The Board has "substantial latitude as to what evidence it may consider in reaching a decision.[17] I am satisfied that the Board's discretion to determine the admissibility of evidence and its appellate role in the administrative process entitle it to exclude evidence which it properly finds should not have been admitted before the Appeals Referee. I find that the Board acted within its legitimate discretion when it excluded hearsay evidence which was admitted by the Appeals

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[16] *Connell v. New Castle*, 2000 WL 707105 (Del. Super. 2000); *Attix v. Voshell*, 579 A.2d 1125 (Del. Super. 1989).

[17] *Robbins v. Deaton*, 1994 WL 45344, at *4 (Del. Super. 1994).

Referee.

11. The employer's contention that the Board capriciously disregarded competent evidence must also be rejected. The test result was, in fact, hearsay. I see no error in the Board's decision that the appellee's admission that he consumed marijuana on one occasion several days after the work accident, or, in other words, about two weeks before his return to work, standing alone, is insufficient to establish that he was under the influence of drugs on his return to work on November 16.

12. Finally, I conclude that the contention that the Board's decision violated the employer's due process rights should also be rejected. The appellant contends that Board Regulation 4.1 created an expectation that the exhibits admitted by the Appeals Referee would be considered by the Board. Regulation 4.1 states:

> The purpose of a hearing before the Board is to examine the factual and legal bases for the decision rendered by the Hearing Officer. The parties shall not re-litigate the case presented to the Referee, but may present additional evidence. Both the Referee's record and any new evidence presented to the Board shall be considered by the Board when making its decision.

The appellant contends that under the circumstances of this case the Board was obligated under due process to give it pre-hearing notice of its intent to exclude the test results as hearsay in the absence of a qualified witness to lay a proper foundation. The appellant further contends that the Board can determine the admissibility only of newly presented evidence – not evidence which was presented before the Appeals Referee. However, while this regulation indicates that the Appeals Referee's record

shall be considered, I do not construe it as requiring the Board to abide by evidentiary rulings of a subordinate hearing officer with which it disagrees. If the Appeals Referee allows evidence into the record which the Board properly concludes is inadmissible hearsay, the Board is not bound to accept the Appeals Referee's decision to do so. I find that the Board's authority to determine the admissibility of evidence, and the weight to be given evidence, includes the authority to exclude evidence considered by the Appeals Referee which it properly concludes should not have been so considered.

13. In the notice which is sent to parties notifying them that an appeal has been taken from the decision of a Claims Deputy and informing them that the appeal will be heard by an Appeals Referee, the following provision appears:

> [P]arties to an ... appeal hearing must present the testimony of live witnesses who possess firsthand knowledge regarding the events they are describing. In cases involving drug testing, this means that the proponent of a drug test result must call witnesses to establish the manner in which a specimen was obtained and preserved as well as the person who tested the specimen before the result of testing will be admitted.[18]

While this appears in a notice regarding the Appeals Referee's hearing, I am satisfied that the provision gave the appellant adequate notice that the Board, in hearing an

[18] Appellee's Ans. Br. Ex. A. The employer complains that this notice should not be considered because it is not contained in the record from below which was filed in this Court. I am taking notice of it, however, because I am satisfied that it is, in fact, part of the proceedings below.

appeal from the Appeals Referee's decision, may take issue with the Appeals Referee's failure to require compliance with this provision regarding the introduction of drug testing evidence.

14. For the aforementioned reasons, the decision of the Board is ***affirmed***.

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.
President Judge

oc: Prothonotary
cc: Order Distribution
File