IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Scrap Resources, Inc., Petitioner	:	
v.	:	No. 1002 C.D. 2010
	:	SUBMITTED: October 8, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER,** President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER **FILED: December 30, 2010**

Employer Consolidated Scrap Resources, Inc. petitions for review of the April 27, 2010 order of the Unemployment Compensation Board of Review (Board) that affirmed the decision of a referee to grant Claimant David W. Shade unemployment compensation benefits. The referee found that Employer failed to establish ineligibility for benefits under Section 402(e.1) of the Unemployment Compensation Law (Law),[1] pertaining to an employee's failure to submit and/or pass a drug test. We reverse.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, added by Section 3 of the Act of December 9, 2002, P.L. 1330, 43 P.S. §802(e.1). Section 402(e.1) of the Law provides:

(Footnote continued on next page…)

The facts as found by the referee and as adopted by the Board are as follows.[2] Claimant worked full-time as a laborer for Employer at $11 per hour until November 10, 2009, when Employer terminated his employment due to a positive drug test. Pursuant to Employer's drug and alcohol policy, testing could be conducted pre-employment, post-accident, randomly and for reasonable suspicion. Here, Employer's human resources manager randomly selected Claimant for a drug test. The Allentown Unemployment Compensation Service Center denied Claimant benefits under Section 402(e.1) of the Law. The referee reversed the UC Service Center's determination, reasoning as follows:

> The employer selected the claimant for a drug test in accordance with its drug and alcohol abuse policy. The claimant apparently participated in the test and the employer apparently received test results, which indicated the claimant tested positive for marijuana. However, the employer did not present sufficient competent evidence to demonstrate that the claimant did fail to pass this drug test. The claimant did not admit to the employer his use of marijuana and the claimant did not make any admissions in this record before the

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(continued…)

> An employe shall be ineligible for compensation for any week—
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> . . .
>
> (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.

[2] In rendering its decision and order, the Board adopted and incorporated the referee's findings and conclusions in their entirety. Credibility and evidentiary weight are determined by the Board, and its findings of fact are conclusive on appeal when the record, in its entirety, contains substantial evidence supporting those findings. *Guthrie v. Unemployment Comp. Bd. of Review*, 738 A.2d 518 (Pa. Cmwlth. 1999).

> [referee] to the use of marijuana or any illegal drugs. The claimant's admissions in the record that he tested positive are admissions only that he was told by the employer or by the drug testing agency that he tested positive. The test was conducted and evaluated by a hospital and a lab, not by the claimant.

Referee's Decision at 2; Reproduced Record ("R.R.") at 59a. The Board affirmed the referee's decision and Employer filed a request for reconsideration, contending that the referee erred in not finding that Claimant's failure to deny the drug-use allegation constituted an admission by silence. In support of its request, Employer cited *McIntyre v. Unemployment Compensation Board of Review*, 687 A.2d 416 (Pa. Cmwlth. 1997), holding that an employee's failure to deny testing positive for drugs when his employer confronts him with the test results may constitute an admission by silence. The Board denied Employer's request, and Employer's timely petition for review to this Court followed.

Employer raises two issues on appeal: 1) whether the Board erred in failing to conclude that Claimant's failure to admit or to deny his positive drug test results or the presence of drugs in his system constituted an admission by silence; and 2) whether the Board erred in concluding that Claimant was eligible for benefits under Section 402(e.1) of the Law. In order to establish ineligibility under Section 402(e.1), the employer must demonstrate that it had an established substance abuse policy and that the employee violated that policy. *Greer v. Unemployment Comp. Bd. of Review,* 4 A.3d 733 (Pa. Cmwlth. 2010) [citing *UGI Utils., Inc. v. Unemployment Comp. Bd. of Review,* 851 A.2d 240 (Pa. Cmwlth. 2004)]. If an employer meets this initial burden, an employee will be rendered ineligible for benefits unless he or she is able to show that the employer's

substance abuse policy is in violation of the law or a collective bargaining agreement. *Id*.

As a threshold matter, the Board argues that Employer waived the first issue by failing to preserve it on appeal. Indeed, Employer never raised an "admission by silence" issue before the referee, presenting it for the first time to the Board in a request for reconsideration. Accordingly, we decline to consider it on appeal. *Watkins v. Unemployment Comp. Bd. of Review*, 751 A.2d 1224 (Pa. Cmwlth. 2000). We turn now to Employer's second issue, whether the Board erred in not concluding that Claimant violated Employer's substance abuse policy.[3]

As background for considering that issue, we note that Employer's representative, without the aid of counsel, testified at the evidentiary hearing by telephone. Because the representative failed to submit any additional documents to the referee's office at least five days before the hearing pursuant to the hearing notice, the referee advised the parties that the only documents from which

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[3] The record includes Claimant's acknowledgment of Employer's "Drug and Alcohol Fitness for Duty Policy." That document, in pertinent part, includes a recitation of Employer's policy:

> [Employer] has a vital interest in maintaining a work environment which promotes the health, welfare and safety of its employees. Being under the influence of drugs or alcohol poses unnecessary and unacceptable safety and health risks not only to the user but to all those that work with him or her. As a result, the company has enacted a zero tolerance policy for ensuring a drug and alcohol free work place. Any failure of a drug or alcohol test will result in termination.
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> In order to enforce this policy, the Company reserves the right to request persons subject to the policy to take **fitness for duty tests**. **This will include random testing**. . . .

Certified Record "C.R.," Item No. 3; R.R. at 7a (emphasis in original).

testimony could be taken were those from the official unemployment compensation file.[4] In response to the hearsay objections of Claimant's counsel to those documents, the referee sustained objections to Exhibits 9, 10, 14 and 15, consisting of Employer's notice of application and questionnaire and copies thereof. On those forms, which we may not consider, Employer's representative indicated that Claimant had tested positive for marijuana in a random drug and alcohol test. She did not, however, independently submit any test results into the record, let alone establish any chain of custody for the results. Accordingly, the only substantive exhibits remaining pertaining to the alleged drug test were Claimant's internet claim forms, Exhibits 7 and 8. With regard to those forms, the referee determined that Claimant admitted therein only that Employer terminated his employment due to failing to pass a drug test, not that Claimant actually used drugs. Claimant did not testify at the hearing.

In support of its position, Employer acknowledges that it never submitted the drug test results into evidence, but cites *Greer* in support of the proposition that such results are not the only means by which an employer can satisfy its burden of proving that an employee violated a substance abuse policy. It points out that the Board's finding in *Greer* that the employee tested positive for cocaine was based, not on the results of the drug test itself, but on the employee's admissions. To that end, Employer argues that Claimant's admissions in his internet claim forms in the present case similarly should have constituted substantial evidence to support a finding that Claimant's urine tested positive for drugs. Specifically, Employer argues that Claimant admitted to drug use via those

[4] To that end, the representative was not permitted to accept any coaching or to consult any documents, resources or computer screens at her location.

forms in that he indicated therein that Employer had discharged him for a "failed or refused drug test" and that the test detected the presence of THC (marijuana). C.R., Item No. 1; R.R. at 2-3a. Further, it notes that in response to the question "Please explain the reasons for the results," Claimant answered as follows: "first one Inconclusive 2nd one failed I was around people who did it [sic]." *Id.*; R.R. at 3a. In addition, in response to a request for "any additional information that you feel may affect your eligibility for unemployment compensation," Claimant responded as follows: "They went by a former employee who was fired for drugs word. I was around people who did it I didnt [sic] do any myself." *Id.*; R.R. at 4a. Accordingly, Employer maintains that Claimant's responses in those forms corroborated his admission that he tested positive for drugs in his urine, not just that he received notice of such test results.

In response, the Board maintains that the referee correctly determined that Employer failed to establish that Claimant failed a drug test. It contends that Employer's representative was unprepared to present the case at the hearing, even to the extent of failing to offer into evidence the test results. Further, the Board argues that the referee may have inappropriately allowed into evidence Claimant's internet claim forms to the extent that they were unsigned and no one asked him whether he had completed the documents.[5] In any event, the Board asserts that any responses that Claimant made on those forms do not constitute admissions that he either used drugs or tested positive, but are merely based on information received from Employer. We disagree with both of these arguments.

[5] We note that this was simply an argument of counsel in this appeal, not a basis asserted by either the referee or the Board in its adjudicative role.

First, the internet claim form containing Claimant's admissions was accepted into evidence without objection, although Claimant's representative objected to a number of other documents and these objections were sustained. The forms were completed and accepted pursuant to the agency's standard process, and initiated Claimant's claim for benefits. Claimant has never suggested that the statements contained therein were not his own.

Moreover, it is clear from the statements therein that Claimant admitted that he failed the test, explaining that the drugs were in his system because "[he] was around people who did it." C.R., Item No. 1; R.R. at 3a. We find this to be competent evidence of ineligibility under Section 402(e.1), which requires proof only that the test was failed, not that the claimant actually took drugs.

For the foregoing reasons, we reverse.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

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v.	:	No. 1002 C.D. 2010
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O R D E R

AND NOW, this 30th day of December 2010, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby REVERSED.

BONNIE BRIGANCE LEADBETTER,
President Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Consolidated Scrap Resources, Inc., Petitioner	:	
v.	:	No. 1002 C.D. 2010
	:	Submitted: October 8, 2010
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

DISSENTING OPINION
BY SENIOR JUDGE FRIEDMAN FILED: December 30, 2010

I respectfully dissent. The majority holds that David W. Shade (Claimant) is ineligible for benefits under section 402(e.1) of the Unemployment Compensation Law (Law)[6] because Claimant admitted he failed a drug test when he filed his internet claim. Because the fact-finder found only that Claimant admitted **he was told** he failed a drug test, I cannot accept this holding.

Consolidated Scrap Resources, Inc. (Employer) discharged Claimant, advising him that he tested positive for marijuana. Claimant applied for unemployment benefits on the internet. The internet claims process involves

[6] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, added by section 3 of the Act of December 9, 2002, P.L. 1330, 43 P.S. §802(e.1). Section 402(e.1) of the Law states, in relevant part, that a claimant shall be ineligible for benefits for any week in which the claimant's unemployment is due to discharge for failure to pass a drug test. 43 P.S. §802(e.1).

providing information in response to a series of questions. Question 13 asked Claimant to "[i]ndicate the reason you were given for being discharged." (R.R. at 3a.) Claimant indicated that the reason was that he failed a drug test. Question 14 asked whether the test detected the presence of drugs, and, if so, "list the substance(s) detected" and "explain the reasons for the results." (*Id.*) Claimant listed marijuana and explained, "I was around people who did it." (*Id.*) The final question asked Claimant to provide any additional information he felt may affect his eligibility for benefits. Claimant reiterated, "I was around people who did it[.] I didn[']t do any myself." (*Id.*)

At the hearing before the referee, Employer relied on these statements in Claimant's application to meet its burden of proving under section 402(e.1) of the Law that Claimant failed a drug test. However, the Unemployment Compensation Board of Review (UCBR), adopting the referee's decision, stated: "The claimant's admissions in the record that he tested positive are admissions only that **he was told** . . . that he tested positive." (Referee's Op. at 2) (emphasis added).

I. Appellate Review

Appellate review of the UCBR's decision is limited to determining whether necessary findings of fact are supported by substantial evidence, whether an error of law was committed or whether constitutional rights were violated. *Stringent v. Unemployment Compensation Board of Review*, 703 A.2d 1084, 1087 (Pa. Cmwlth. 1997). Facts as found by the UCBR are conclusive if this court finds that there is substantial evidence in the record to support those findings. *Id.* In reviewing the record to determine whether there is substantial evidence to support

the UCBR's findings of fact, **this court must view the record in the light most favorable to the party which prevailed before the UCBR, giving that party the benefit of all logical and reasonable inferences deducible from the evidence**. *Id.*

Here, it was reasonable for the UCBR to infer from Claimant's internet claim that: (1) Claimant **was told** he tested positive for marijuana; (2) Claimant had **no personal knowledge** that he tested positive; and, (3) **assuming** it might be true, Claimant guessed that he tested positive because he was around people who used marijuana. I submit that the majority, in stating that Claimant "admitted that he failed the test," (majority op. at 7), has not viewed the evidence in the light most favorable to Claimant and has not given Claimant the benefit of all logical and reasonable inferences deducible from the evidence. In my view, the record contains substantial evidence to support the UCBR's finding that Claimant only was told that he failed the drug test, and, therefore, that finding is conclusive on appeal.

II. Claimant's Objection

The majority erroneously states that Claimant's internet claim "was accepted into evidence without objection." (Majority op. at 7.) At the hearing, the internet claim was identified as Exhibits 7 and 8. (N.T., 3/8/2010, at 4, R.R. at 21a.) Claimant objected to the admission of Exhibits 7 and 8 on hearsay grounds.[7]

[7] I note that, in *Greer v. Unemployment Compensation Board of Review*, 4 A.3d 733, 737 n.7 (Pa. Cmwlth. 2010), this court considered a claimant's statements in the claimant questionnaire that he tested positive for cocaine because the claimant failed to object to its admission as hearsay and because the record contained competent corroborating evidence. Here, **(Footnote continued on next page…)**

(N.T., 3/8/2010, at 5, R.R. at 22a.) Employer argued that, because the exhibits were filled out by Claimant, they were admissions. (*Id.*) On that basis, the referee overruled the objection. (*Id.*) However, Employer never offered any evidence to show that Claimant filled out the internet claim.[8]

For the foregoing reasons, I would affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

(continued…)
because Claimant objected to the admission of the internet claim as hearsay, such evidence is not competent to support a finding that he tested positive for marijuana. *See Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366, 370 (Pa. Cmwlth. 1976).

[8] The majority states that "Claimant has never suggested that the statements contained therein were not his own." (Majority op. at 7.) However, it was Employer's burden to prove that Claimant failed a drug test, and the only evidence Employer presented was an unsigned printout of a purported internet claim filed by Claimant. It certainly is not an onerous burden to require that an employer ask a claimant whether he or she completed the internet claim.