IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Burgmeier's Hauling, Inc., Petitioner	:	
v.	:	
Unemployment Compensation Board of Review, Respondent	:	No. 1406 C.D. 2009
	:	Submitted: December 11, 2009

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE JOHNNY J. BUTLER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE BUTLER FILED: January 21, 2010

Burgmeier's Hauling, Inc. (Employer) petitions for review of the July 1, 2009 order of the Unemployment Compensation Board of Review (UCBR) affirming the Referee's decision granting Donald J. Dibert (Claimant) benefits. The issue before the Court is whether the UCBR erred as a matter of law in determining that Employer failed to meet its burden of proof pursuant to Section 402(e) of the Unemployment Compensation Law (Law).[1] For the following reasons, we affirm the UCBR.

[1] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. § 802(e). Employer presented the issue as whether the UCBR disregarded substantial evidence that Claimant had engaged in illegal drug activity on its premises, thereby violating a reasonable work rule and disregarding Employer's interests. However, the UCBR never made a determination concerning the violation of a work rule.

Claimant was employed by Employer from April of 2008 until February 23, 2009. On January 10, 2009, Claimant opened a gate to Employer's recycling facility property allowing an individual in a car onto the property after the facility had been closed to the public. Claimant entered the vehicle for several minutes, and was observed by Richard Butler (Butler), another employee, exchanging money with the individual in the car. Claimant and another employee, Jeff Burgmeier (Burgmeier), then went behind a dumpster. When Claimant reentered the recycling facility he excused himself to the restroom, and when he returned to his duties, Butler noticed that Claimant had an orange powder on his nose and mentioned it to Claimant. All of Claimant's actions outside of the recycling facility were recorded on a surveillance video.

On January 12, 2009, Claimant's actions on January 10, 2009 were brought to Employer's attention. Employer reviewed the surveillance video, and questioned Claimant and Burgmeier, as well as other employees who worked on the day in question. Claimant said that the individual in the car was only bringing him cigarettes, but when asked to have the individual corroborate his story, Claimant was unable to contact the individual. Based on the investigation, Employer believed Claimant had purchased and used drugs while working on January 10, 2009. After giving Claimant time to contact the individual in the car, which he was unable to do, Employer terminated Claimant on February 23, 2009.

Claimant filed for unemployment compensation (UC) benefits and was determined to be eligible by the Altoona UC Service Center. Employer filed a timely appeal, and a hearing was held on April 16, 2009, at which Claimant, Butler and Employer's owner, David Burgmeier, testified. The Referee issued an order on April 22, 2009 affirming the UC Service Center's eligibility determination, and Employer

timely appealed to the UCBR. On July 1, 2009, the UCBR affirmed, adopted and incorporated the Referee's decision, concluding Employer failed to meet its burden of proof. Employer appealed to this Court.[2]

Employer argues that the UCBR erred in disregarding substantial competent evidence that Claimant was engaging in illegal drug activity on Employer's premises, in violation of Employer's drug and alcohol policy.

Under Section 402(e) of the Law, an employee is not eligible for benefits if "his unemployment is due to his discharge . . . for willful misconduct connected with his work . . . ."

> Willful misconduct has been defined as (1) the wanton and willful disregard of the employer's interest; (2) the deliberate violation of rules; (3) the disregard of standards of behavior which an employer can rightfully expect from his employee; or (4) negligence which manifests culpability, wrongful intent, evil design or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Elser v. Unemployment Comp. Bd. of Review, 967 A.2d 1064, 1069 n.7 (Pa. Cmwlth. 2009).

> [A]n employer has the burden of proving that an employee has engaged in willful misconduct. In the case of a work rule violation, the employer must establish the existence of the rule, the reasonableness of the rule and its violation. Furthermore, whether or not an employee's actions rise to the level of 'willful misconduct' is a question of law that is fully reviewable by this Court.

Lindsay v. Unemployment Comp. Bd. of Review, 789 A.2d 385, 389-90 (Pa. Cmwlth. 2001) (citation omitted).

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[2] "Our scope of review in unemployment compensation cases is limited to determining whether constitutional rights were violated, whether errors of law were committed or whether findings of fact are supported by substantial evidence." *Lindsay v. Unemployment Comp. Bd. of Review*, 789 A.2d 385, 389 n.4 (Pa. Cmwlth. 2001).

"Substantial evidence has been generally defined as relevant evidence that a reasonable mind might accept as adequate to support a conclusion. Circumstantial evidence, if substantial, is sufficient to support a finding of willful misconduct." *Ruiz v. Unemployment Comp. Bd. of Review*, 887 A.2d 804, 808 (Pa. Cmwlth. 2005) (citation omitted). However, "speculation does not amount to substantial evidence." *Frey v. Unemployment Comp. Bd. of Review*, 589 A.2d 300, 303 (Pa. Cmwlth. 1991) (quoting *Bobchock v. Unemployment Comp. Bd. of Review*, 525 A.2d 463, 465 (Pa. Cmwlth. 1987)).

Here, there is no dispute that Employer has a rule concerning drug activity, nor that it was reasonable. Therefore, the only question before this Court is whether Employer met its burden to prove that Claimant violated a work rule.

Employer relies on the "direct" evidence of Butler witnessing an orange powder on Claimant's nose to prove that Claimant was buying and using drugs on Employer's property. Butler testified that he observed Claimant engaging in suspicious activity, and that he had an orange powder around his nose when he returned from the restroom. Reproduced Record (R.R.) at 29a. These suspicious activities were viewed by Employer on video surveillance. R.R. at 19a. Butler also testified that he thought the orange powder around Claimant's nose was Suboxone, a drug used to assist people recovering from heroine addiction. R.R. at 30a. While expert testimony is not required to prove drug use, there was no evidence to support Butler's conclusion that the orange powder was Suboxone. *Neimeic v. Unemployment Comp. Bd. of Review*, 430 A.2d 697 (Pa. Cmwlth. 1981). Further, the UCBR determined that:

> at best the employer has presented the testimony of a firsthand witness who observed orange powder on the claimant's nose and <u>believed</u> it to be a drug which is used to treat heroine addiction. The employer did not drug test the

> claimant and has no other testimony or evidence to corroborate the employer's suspicions. The mere fact that the employer and this witness believed the claimant was acting suspicious on January 10, 2009 or that the powder on his nose was an illegal drug is insufficient to meet the employer's burden.

UCBR Decision at 5.[3] We agree with the UCBR. Given that speculation and suspicions are insufficient to support a finding of illegal drug activity, we hold that the UCBR did not err in determining that Employer failed to meet its burden of proof that a work rule had been violated.

For the reasons stated, we affirm the UCBR.

JOHNNY J. BUTLER, Judge

[3] Employer argued that the UCBR was holding it to a higher burden of proof in stating that Claimant should have been sent for a drug test to prove willful misconduct for drug activity. The UCBR, however, merely suggested that a drug test would have been useful in confirming Employer's suspicion.

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O R D E R

AND NOW, this 21st day of January, 2010, the July 1, 2009 order of the Unemployment Compensation Board of Review is affirmed.

JOHNNY J. BUTLER, Judge