IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey Slagle,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 1860 C.D. 2007
	:	
Unemployment Compensation Board of Review,	:	Submitted: February 1, 2008
	:	
	:	
Respondent	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: March 19, 2008**

Jeffrey Slagle (Claimant) petitions for review of an order of the Unemployment Compensation Board of Review (Board), which reversed the Referee's decision granting him benefits under Section 402(e.1) of the Unemployment Compensation Law (Law).[1] On appeal, Claimant argues that there is no substantial evidence in the record to support the Board's finding that Claimant failed a drug test and, therefore,

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

that the Board erred in denying him benefits under Section 402(e.1) of the Law.[2] For the reasons that follow, we affirm.

Claimant applied for unemployment compensation benefits after becoming separated from his employment with Alsplundh Tree Expert Co. (Employer). The Lancaster UC Service Center (Department) issued a determination finding Claimant ineligible for benefits under Section 402(e.1) of the Law. Claimant appealed the Department's determination, and an evidentiary hearing was held before a Referee at which Claimant and Ned Landis, a witness for Employer, appeared. Following the hearing, the Referee issued a decision reversing the Department's determination and finding Claimant eligible for benefits. Employer appealed the Referee's decision to the Board. The Board issued a decision and order reversing the Referee's decision and finding Claimant ineligible for benefits under Section 402(e.1) of the Law. In its decision, the Board made the following findings of fact:

1. The claimant was last employed as a foreman by [Employer] from September 1989 at a final rate of $18.19 per hour and his last day of work was May 16, 2007.
2. The employer's policy, of which the claimant was or should have been aware, provides for random drug testing.

[2] Claimant actually presents three separate arguments in his brief: (1) Employer's failure to meet its burden in not producing a record of the urinalysis Claimant allegedly failed in its entirety, coupled with Employer's failure to produce any corroborating evidence of this test, should result in Claimant being found eligible for benefits under Section 402(e.1); (2) silence should only be considered an admission when the circumstances require a reply and should never be considered substantial, corroborating evidence where Employer falls short of meeting its burden of proof; and (3) without any further substantial, corroborating evidence to support the hearsay evidence of a non-admitted test, the Board cannot conclude that Employer upheld their burden of willful misconduct. Because these three arguments essentially go to the same issue, they have been consolidated into the issue that is set forth in the text of this opinion.

3. The claimant also possesses a CDL [commercial driver's license] and can be randomly drug tested under Department of Transportation Regulations.
4. The employer's policy provides no tolerance for being under the influence of controlled substances and provides for immediate termination of employment for failing a drug test.
5. The claimant was, or should have been, aware of these policies.
6. The claimant was selected to attend a random drug screening.
7. The claimant tested positive for marijuana.
8. The claimant was discharged for failing a drug test.
9. The claimant did not have adequate justification for his conduct.

(Board Decision, Findings of Fact (FOF) ¶¶ 1-9, R. Item No. 12.) In determining that Claimant is ineligible for benefits under Section 402(e.1) of the Law, the Board reasoned that: "[t]he claimant was discharged for failing a drug test. The claimant admitted that he failed the drug test. The claimant does not deny that the drug test came back positive, nor does he offer an explanation for the positive result." (Board Decision at 2.) Claimant filed a request for reconsideration of the Board's decision and order, which was denied by the Board. Claimant's appeal to this Court followed.[3, 4]

[3] Claimant filed an Application for Summary Relief (Application) to which the Board filed an answer. On December 7, 2007, argument was held on Claimant's Application before Senior Judge Feudale. Following argument, Senior Judge Feudale issued an order denying Claimant's Application, finding that the issues were not sufficiently clear. Slagle v. Unemployment Compensation Board of Review (Pa. Cmwlth., No. 1860 C.D. 2007, filed Dec. 7, 2007).

[4] "The Court's review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record." W. & S. Life Ins. Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

On appeal, Claimant argues that there is no substantial evidence in the record to support the Board's finding that Claimant failed a drug test and, therefore, that the Board erred in denying him benefits under Section 402(e.1) of the Law. Specifically, Claimant contends that Employer failed to present the actual drug test results and establish the proper chain of custody. Claimant also contends that although Employer's witness, Mr. Landis, testified as to a failed drug test, such testimony was hearsay. Claimant further contends that there is no other evidence contained in the record to corroborate the hearsay testimony that was given by Mr. Landis.[5] We disagree.

Section 402(e.1) of the Law provides that a claimant is ineligible for unemployment compensation benefits for any week:

> [i]n 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.

[5] Claimant asserts that it was inappropriate for the Board to consider Claimant's silence as an admission. Claimant is misconstruing the Board's decision. When giving the reasoning for its decision, the Board first stated that "[t]he claimant admitted that he failed the drug test." (Board Decision at 2.) This statement was based on the admissions that Claimant made to the Department and the testimony that he provided at the Referee's hearing. (Board Br. at 5-6.) Only after the Board acknowledged that Claimant had admitted that he failed the drug test, did it go on to say that "[t]he claimant does not deny that the drug test came back positive, nor does he offer an explanation for the positive result." (Board Decision at 2.) Thus, it appears that the Board was not basing its decision solely on Claimant's failure to deny the positive drug test results, but rather was merely using it to buttress Claimant's direct admissions. We find that the Board did not err in using Claimant's failure to deny the positive drug test results in this manner.

43 P.S. § 802(e.1). Thus, under Section 402(e.1), an employer has the burden of proving that the claimant was discharged for refusing or failing a drug test that was administered pursuant to an established substance abuse policy. UGI Utils., Inc. v. Unemployment Compensation Board of Review, 851 A.2d 240, 252 (Pa. Cmwlth. 2004).

In the present case, the Board found that Employer had a substance abuse policy, of which Claimant was or should have been aware, that provided for random drug testing. (FOF ¶¶ 2, 4.) The Board also found that Claimant was selected for random drug testing. (FOF ¶ 6.) The Board further found that Claimant tested positive for marijuana and that he was discharged as a result. (FOF ¶ 7-8.) Claimant is only asserting that there is no substantial evidence in the record to support the Board's finding that Claimant's drug test results were positive.[6]

It is well settled that "the findings of fact made by the Board, or by the referee as the case may be, are conclusive on appeal so long as the record, taken as a whole, contains substantial evidence to support those findings." Taylor v. Unemployment Compensation Board of Review, 474 Pa. 351, 355, 378 A.2d 829, 831 (1977). Substantial evidence is that relevant evidence which a reasonable mind might accept as adequate to support the conclusion reached. Brown v. Unemployment Compensation Board of Review, 854 A.2d 626, 628 (Pa. Cmwlth. 2004). The long-established rule regarding hearsay evidence provides that:

[6] The unchallenged findings of the Board are conclusive on appeal. Salamak v. Unemployment Compensation Board of Review, 497 A.2d 951, 954 (Pa. Cmwlth. 1985).

> (1) [h]earsay evidence, *properly objected to*, is not competent evidence to support a finding of the Board. . . . (2) 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*, but a finding of fact based solely on hearsay will not stand.

Walker v. Unemployment Compensation Board of Review, 367 A.2d 366, 370 (Pa. Cmwlth. 1976) (emphasis in original).

Here, Employer did not present Claimant's actual drug test results. Instead, the only evidence that Employer presented was the testimony of Mr. Landis. Mr. Landis testified that Claimant's name was one of four that were randomly drawn to be tested and that Claimant was taken to a test facility in East Berlin, Pennsylvania. (Referee Hr'g Tr. at 3, July 3, 2007, R. Item No. 8.) Mr. Landis further testified that "I guess the notification [came] back as, [Claimant's] drug test was positive." (Referee Hr'g Tr. at 3.) Claimant asserts, and we agree, that Mr. Landis's testimony regarding the positive drug test result constitutes hearsay. Thus, Mr. Landis's testimony, when considered by itself, cannot support the Board's finding. Walker, 367 A.2d at 370. However, Claimant did not object to Mr. Landis's testimony. Therefore, our analysis does not end here, as there may be other evidence in the record that, when considered by itself or in conjunction with Mr. Landis's unobjected to hearsay testimony, provides substantial evidence to support the Board's finding.

Our review of the record reveals that Claimant admitted to the Department that he failed a drug test and that such test had detected the presence of marijuana. (Claimant Questionnaire, May 17, 2007, R. Item No. 3.) When asked to provide an explanation for the failed drug test, Claimant advised the Department that: "I have

taken random testings before and never had failed them. I asked to be retested but I got fired instead. I suppose there could have been a chance I would have failed the test. I just thought I would be given another opportunity to pass the test." (Claimant Questionnaire.) We find that Claimant's admissions to the Department, in and of themselves, constitute substantial evidence to support the Board's finding of a positive drug test result. See Louk v. Unemployment Compensation Board of Review, 455 A.2d 766 n.4 (Pa. Cmwlth. 1983) (finding that admissions against interest were admissible as exceptions to the hearsay rule).

Moreover, during the hearing before the Referee, Claimant testified, albeit very briefly, as follows:

> I wanted a second chance, another test to be [taken]. And they had told me that they could test the same one again. The doctor told me that. But it was no chance of another test, and I thought – I just thought, from in here, that I could get another test, you know, within the time frame there, close to about.

(Referee Hr'g Tr. at 5.) By providing this testimony, Claimant again, at least impliedly, admitted that he failed a drug test. That is, there would have been no need for Claimant to request a second chance and another test to be taken, unless he had failed the first test. We find that Claimant's admission during the Referee's hearing also, in and of itself, provides substantial evidence in support of the Board's finding of a positive drug test result. See Braun v. Unemployment Compensation Board of Review, 506 A.2d 1020, 1021-22 (Pa. Cmwlth. 1986) (finding that an admission

made by a party during a Referee's hearing was not hearsay).[7] Because the challenged finding is supported by substantial evidence in the record, that finding is conclusive and cannot be overturned on appeal. Taylor, 474 Pa. at 355, 378 A.2d 831.

Therefore, as the Board's conclusive findings establish that Claimant was discharged for failing a drug test conducted pursuant to Employer's established substance abuse policy, we conclude that the Board did not err in denying Claimant benefits under Section 402(e.1) of the Law.

Accordingly, the order of the Board is affirmed.

RENÉE COHN JUBELIRER, Judge

[7] Even if Claimant's admission during the Referee's hearing did not support the Board's finding by itself, such testimony was competent to add weight and/or credibility to the unobjected to hearsay testimony of Mr. Landis. Socash v. Unemployment Compensation Board of Review, 451 A.2d 1051, 1053 (Pa. Cmwlth. 1982). Because Mr. Landis's unobjected to hearsay testimony is corroborated by Claimant's testimony, it may also be considered as support for the Board's finding of a positive drug test result. Walker, 367 A.2d at 370.

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	:	
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O R D E R

NOW, March 19, 2008, the order of the Unemployment Compensation Board of Review in the above-captioned matter is hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge