IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Phoenixville Area YMCA, Petitioner	:	
v.	:	No. 219 C.D. 2008
	:	Submitted: June 13, 2008
Unemployment Compensation Board of Review, Respondent	:	

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE FRIEDMAN FILED: July 25, 2008

Phoenixville Area YMCA (Employer) petitions for review of the January 7, 2008, order of the Unemployment Compensation Board of Review (UCBR), which affirmed the decision of a referee granting Bethanne Smith (Claimant) unemployment compensation (UC) benefits. We also affirm.

Claimant worked full-time as director of Employer's physical department. Employer maintains a policy, known to Claimant, prohibiting the intentional falsification of documents. On June 29, 2007, Employer reviewed time slips submitted by Mike Ames; although Ames was an employee in Claimant's department, Ames was being paid from a different department's budget with Claimant's approval. Because Claimant was not authorized to approve Ames' payment from the other department, Employer concluded that Claimant had

falsified payroll records and discharged Claimant for violating Employer's policy.[1] (Findings of Fact, Nos. 1-4, 6-7, 10.)

Claimant applied for UC benefits, which the local job center granted. Employer appealed the award of benefits, and a referee held a hearing at which both Employer and Claimant presented evidence.

Testifying on her own behalf, Claimant explained that she hired Ames, a professional basketball player, to run the "Hoop Dreams" program, which included three, nine-week sessions of detailed basketball instruction. Claimant testified that she wanted to hire Ames as an independent contractor but was told by Ann Nelson, Employer's branch manager, that Employer did not hire independent contractors. Claimant stated that, after discussing with Nelson the possibility of hiring Ames as a personal trainer and paying him from the wellness budget, it was agreed that Ames would be compensated in this manner for his work on the "Hoop Dreams" program. Claimant testified that she did not intentionally violate any of Employer's rules or policies and that she did not personally benefit from the payroll decisions that were made regarding Ames' compensation. (N.T. at 23-25, 29.)

Testifying on behalf of Employer, Nelson stated that Claimant approved Ames' compensation from the wellness department's budget without

[1] Employer also alleged that Claimant was discharged for insubordination and unsatisfactory job performance. However, the referee rejected these allegations, and Employer has not appealed that determination.

authorization, in violation of Employer's payroll policies. According to Nelson, the "Hoop Dreams" program was a two-week program that occurred in the previous summer, and Ames had been paid for his work. Although Nelson recalled agreeing to pay Ames as a personal trainer, she stated that Ames had never been seen in the wellness department working as a personal trainer. Finally, Nelson reiterated that she did not authorize Claimant to pay Ames for his work in the "Hoop Dreams" program from the wellness budget.[2] (N.T. at 6-7, 9, 12, 22-23.)

Crediting Claimant's testimony, the referee found that Claimant did not falsify payroll records in violation of Employer's work rule because Employer was aware of the decision to pay Ames from the wellness budget. (Findings of Fact, No. 12; Referee's op. at 2.) The referee concluded that Employer failed to meet its burden of proving that Claimant's actions constituted willful misconduct, and, therefore, Claimant was not ineligible for UC benefits pursuant to section 402(e) of the Unemployment Compensation Law (Law).[3]

---

[2] Employer also introduced Ames' time sheets, which included Claimant's authorization of payment from the wellness department's budget. In addition, Employer presented statements from other employees that Claimant advised them that Ames was to be paid from the wellness department's budget. (N.T. at Exhs. E1-E5, E7.)

[3] Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(e). Section 402(e) of the Law provides that an employee will be ineligible for UC benefits for any week in which her unemployment is due to her discharge or temporary suspension from work for willful misconduct connected with her work. 43 P.S. §802(e). The employer bears the burden of proving willful misconduct in order to disqualify a claimant from receiving benefits. *Docherty v. Unemployment Compensation Board of Review*, 898 A.2d 1205 (Pa. Cmwlth. 2006). Where the claimant's misconduct is based on the violation of an employer's rule or policy, the employer bears the burden of establishing both the existence of a reasonable rule or policy and its violation by the claimant. *Id.*

Employer appealed to the UCBR, which affirmed the referee's decision and adopted the referee's findings of fact and reasoning.[4] The UCBR also rejected Employer's request to submit additional testimony to rebut Claimant's testimony about the "Hoop Dreams" program, reasoning that Employer had an opportunity for a full and fair hearing during which it could have presented such testimony. Employer now petitions this court for review.[5]

Employer first argues that the UCBR erred in holding that Employer failed to meet its burden of proving that Claimant violated its payroll rule by falsifying payroll documents. Citing *Philadelphia Gas Works v. Unemployment Compensation Board of Review*, 654 A.2d 153 (Pa. Cmwlth. 1995), Employer asserts that the UCBR's determination is not supported by substantial evidence because it is based solely on Claimant's **uncorroborated** and "incredible" testimony. (Employer's brief at 17.) According to Employer, without additional, corroborating evidence, Claimant's testimony alone could not support any findings of fact. We disagree.

---

[4] Questions of credibility, evidentiary weight and the inferences to be drawn from the evidence are for the UCBR to determine. *Browning-Ferris Industries of Pennsylvania, Inc. v. Unemployment Compensation Board of Review*, 532 A.2d 1266 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 628, 541 A.2d 1139 (1988). The decision of the UCBR, as the final arbiter of credibility, will not be disturbed if supported by substantial evidence. *Id.* Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Philadelphia Gas Works v. Unemployment Compensation Board of Review*, 654 A.2d 153 (Pa. Cmwlth. 1995).

[5] Our scope of review is limited to determining whether constitutional rights were violated, whether the adjudication is in accordance with the law and whether the necessary findings of fact are supported by substantial evidence. Section 704 of the Administrative Agency Law, 2 Pa. C.S. §704.

Initially, we reject Employer's contention that, under *Philadelphia Gas Works*, Claimant was required to submit evidence to corroborate her testimony. In *Philadelphia Gas Works*, the claimant was terminated from his employment for violating the employer's drug and alcohol policy by testing positive for drugs. The referee denied benefits but, based on the same record, the UCBR reversed, based solely on crediting the claimant's testimony that he did not "believe" that the urine sample that tested positive was his and that he had not taken drugs in approximately two months. On appeal to this court, we reversed the UCBR's decision, holding that the UCBR ignored the **overwhelming and undisputed** evidence in the record that the claimant had tested positive for drugs. We noted that this court has never permitted a credibility determination, **where not supported by the evidence**, to be used to grant benefits where none would otherwise be granted under the Law. That is not this case.

Here, Claimant did not testify that she "believed" that she did not violate the policy; rather, she explained why she did **not** willfully violate Employer's rule. For its part, Employer did not present **overwhelming and undisputed** evidence that Claimant violated the payroll policy; it chose to rely on Nelson's testimony to that effect, and the UCBR did not credit this testimony.[6]

[6] We point out that because Claimant credibly testified that she had Employer's approval to pay Ames from the wellness department's budget, the fact that Claimant advised the wellness department's secretaries to include Ames' hours in the wellness department's payroll and that Claimant approved Ames' wellness department hours is not overwhelming evidence that Claimant violated Employer's payroll policies.

Moreover, we reject Employer's argument that Claimant's credible testimony alone cannot support the award of benefits. It is well-settled that a claimant's credible testimony constitutes substantial evidence that will support a finding of fact. *Kelly v. Unemployment Compensation Board of Review*, 747 A.2d 436 (Pa. Cmwlth. 2000); *Browning-Ferris Industries of Pennsylvania, Inc. v. Unemployment Compensation Board of Review*, 532 A.2d 1266 (Pa. Cmwlth. 1987), *appeal denied*, 518 Pa. 628, 541 A.2d 1139 (1988); *Unemployment Compensation Board of Review v. Hilton Hotels Corporation*, 368 A.2d 855 (Pa. Cmwlth. 1977). Here, Claimant's credible testimony that she did not falsify any payroll records because she received Employer's permission to pay Ames from the wellness department's budget provides ample support for the UCBR's findings and its conclusion that Employer failed to establish Claimant's violation of a work rule.[7]

Finally, we reject Employer's contention that the UCBR abused its discretion by not remanding the matter to allow Employer to present additional evidence to rebut Claimant's testimony concerning Ames' involvement in the "Hoop Dreams" program. This court consistently has held that a remand hearing generally is granted to allow a party the opportunity to present evidence not offered

[7] We also reject Employer's assertion that the UCBR capriciously disregarded Nelson's testimony that Claimant violated Employer's payroll policies. Attributing greater credibility to one witness' testimony than to the testimony presented by others is simply a manifestation of the UCBR's fact finding role and does not constitute a capricious disregard of evidence. *Borough of Tyrone v. Unemployment Compensation Board of Review*, 415 A.2d 146 (Pa. Cmwlth. 1980).

at the original hearing **because it was not then available**.[8] *Fisher v. Unemployment Compensation Board of Review*, 696 A.2d 895 (Pa. Cmwlth. 1997); *Brady v. Unemployment Compensation Board of Review*, 539 A.2d 936 (Pa. Cmwlth. 1988). Employer does not assert that the additional evidence it now seeks to include in the record was unavailable at the time of the initial hearing; rather, Employer argues that it did not have an opportunity to present evidence to contradict Claimant's "Hoop Dreams" testimony. However, the record is clear that Employer had an opportunity to contradict Claimant's testimony at the first hearing and, in fact, attempted to do so through Nelson's testimony, which the UCBR rejected. Therefore, we decline to give Employer a "second bite at the apple" to satisfy its burden of proof.

Accordingly, we affirm.

ROCHELLE S. FRIEDMAN, Judge

[8] For example, in *Puhl v. Workers' Compensation Appeal Board (Sharon Steel Corporation)*, 724 A.2d 997 (Pa. Cmwlth. 1999), we held that a remand was appropriate to allow a claimant to present material and non-cumulative medical evidence, which only became available after the close of the record when the claimant was awarded Social Security disability benefits and Medicare allowing him to seek more sophisticated medical testing at a specialty clinic.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Phoenixville Area YMCA, Petitioner	:	
v.	:	No. 219 C.D. 2008
Unemployment Compensation Board of Review, Respondent	:	

O R D E R

AND NOW, this 25th day of July, 2008, the order of the Unemployment Compensation Board of Review, dated January 7, 2008, is hereby affirmed.

_____

ROCHELLE S. FRIEDMAN, Judge